(17,206.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 621.

J. W. CUMMING, JAMES S. HARPER, AND JOHN C. LADEVEZE, PLAINTIFFS IN ERROR,

vs.

THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA.

IN ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, STATE OF GEORGIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1898.

a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the superior court of Richmond county, State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court on a remittitur from the supreme court of the State of Georgia, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. W. Cumming, James S. Harper, and John C. Ladeveze, complainants, and The County Board of Education of Richmond County, State of Georgia, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was
b drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said complainants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

c [Endorsed:] Filed in the office of the clerk of the superior court of Richmond county, Georgia, this November 28th, 1898. Wm. E. Keener, clerk superior court, Richmond county, Georgia.

1 STATE OF GEORGIA,
Richmond County.

To the honorable the superior court of said county:

The petition of J. W. Cumming, James S. Harper, and John C. Ladeveze, who sue for themselves and all others in like case in this petition joining, respectfully showeth:

1st. That your petitioners are citizens of said State and residents, property-owners, and tax-payers in and of said county, and subject therein to all lawful taxes levied by said State or by its authority.

2nd. That the board of education of said county is a body corporate, incorporated under an act of the General Assembly of said State entitled An act to regulate public instruction in the county of Richmond, approved August 23rd, 1872, under the name of the county board of education, and commonly called the board of education of Richmond county; by said act is empowered to annually levy upon all the tax-payers of said county such tax as said board may deem necessary for public-school purposes in said county, as authorized by said act; which tax it is the duty of Charles S. Bohler, the county tax collector of said county, to collect.

3rd. That on the tenth day of July, 1897, said board levied for the year 1897, on all the tax-payers of said county, for public-school purposes in said county, to wit, for the support of a system of primary schools and a system of intermediate schools and a system of grammer schools and a system of high schools in said county, by said board a tax of forty-five thousand dollars, said tax being a tax of two and two-tenths mills on each one hundred dollars of taxable property; which said tax is now due and said tax collector is now proceeding to collect the same.

4th. That to so much of said tax as has been levied and is now being collected for the support of the primary, intermediate, and grammer schools system aforesaid you petitioners oppose no objections, but your petitioners aver that so much of said tax as has been levied and is now being collected for the support of said system *if* high schools in said county by said board is illegal and void, for the reason that said system of high schools is for the use and benefit of the white school population of said county exclusively,
2 and said board is not authorized by law to levy upon nor is said tax collector authorized by law to collect from the tax-payers of said county any tax for the support in said county by said board of any system of high schools wherein the colored school population of said county are not given the same educational facilities as the white schools populations of said county, the last quadrennial enumeration of the school population of said county, as taken pursuant to law, in the year 1894, showing the white school population of said county to be 8,866.

And your petitioners aver that at least $4,500 of said tax of $45,000, or ten (10) per cent. thereof, has been levied and is now being collected, and when collected will be used by said board for the support of said illegal system of high schools.

5th. That said board has now on hand the sum of twenty thousand dollars or other large sum, the proceeds of prior tax levies made by it on the tax-payers of said county of prior quotas of the State educational fund allotted said county, of prior poll taxes collected in said county and from other and lesser sources of revenue, all whereof said board has in hand in trust to disburse solely for legal educational purposes in said county; that for the present year, 1897, said board will receive from its said tax levy of July 10th, 1897, from the State educational fund of 1897, from the poll tax of 1897, and from said other sources of revenue other large sums in like trust; that said board is now the owner and has the custody and control of a large and valuable quantity of school fixtures and furniture and of educational equipments and appliances generally, all whereof said board holds in like trust; that said board is not authorized by law to expend any part of said funds, accrued or accruing, or to use any part of said property for the support and maintenance or in the operation of any system of high schools in said county wherein the colored school population of said county is not given the same educational facilities as the white school population thereof, but, nevertheless, so it is that said board is now using said accrued fund and said property, and threatens, means, and intends to use said
3 accruing funds and said property, in the support, maintenance, and operation of its present existing high-school system in said county, the educational advantages of said high-school system being by said board restricted wholly to the use and benefit of the white school population of said county, to the entire exclusion of the colored school population thereof. And your petitioners charge that by said illegal use, present and meditated, of said funds and said property a deficiency of funds and appliances for lawful educational purposes in said county by said board will inevitably result, and to make good such deficiency additional taxation on the tax-payers of said county must and will be imposed.

6th. That your petitioners are persons of color and are, respectively, parents of children of school age, lawfully entitled to the full benefit of any system of high schools organized or maintained by said board in said county. Your petitioners aver that up to the time of said tax levy and for many years continuously prior thereto said board maintained a system of high schools in said county, such as authorized by law, to wit, a system wherein the colored school population of said county had the same educational advantages as the white school population thereof, but on July 10th, 1897, said board withdrew from and denied to the colored school population of said county any admission to or participation in the educational facilities of a high-school system in said county, and now still denies and has voted to continue to deny to said colored school population any admission to or participation in said educational facilities. Your petitioners show that at the time of such

withdrawal and denial your petitioners respectively had children attending the colored high school then existing, but by means of said withdrawal and denial said children of your petitioners are now wholly denied and debarred from any participation in the benefits of a public high-school education in said county, though petitioners are being taxed therefor. Your petitioners, specially pleading and relying upon so much of the supreme law of the land, to wit, the Constitution of the United States, as declares that no State shall deny any person within its jurisdiction the equal protection of the laws, avers that said action of said board, whereby your petitioners, in the persons of their said children, are denied and debarred from an equal participation in the educational
4 advantages of the high-school system maintained in said county by said board with public funds raised by taxation or otherwise is a denial of the equal protection of the laws, such as forbidden by said Constitution, and that it is inequitable, illegal, and unconstitutional for said board to levy upon or for said tax collector to collect from your petitioners any tax for educational purposes in said county, *for* the benefits whereof your petitioners, in the persons of their children of school age, are excluded and debarred.

7th. That your petitioners have no adequate legal remedy in the premises.

Wherefore, waiving discovery, your petitioners pray:

1. That the said tax collector be enjoined from collecting so much of said tax levy of July 10th, 1897, as has been levied for the support by said board in said county of sais system of high schools.

2. That said board be enjoined from using any funds or property now in or hereafter coming into its hands for educational purposes in said county for the support, maintenance, or operation of said system of high schools.

3. That process issue to said board and to said tax collector to be and appear at the next term of this honorable court, then and there to answer petitioners' complaint.

4. That your petitioners have such other and further relief as in the premises shall to equity seem meet.

SALEM DUTCHER,
HAMILTON PHINIZY,
JOE S. REYNOLDS,
Petitioners' Attorneys.

5 STATE OF GEORGIA, }
Richmond County. }

Personally appeared John C. Ladeveze, and on oath says that he is one of the petitioners in the foregoing petition, and that the facts set out in said petition are true.

JOHN C. LADEVEZE.

Sworn to and subscribed before me this 18 day of September, 1897.

E. B. BAXTER,
Not. Pub., Rich. Co., Ga.

STATE OF GEORGIA,
Richmond County.

Personally appeared J. B. Cumming, and on oath says that he is one of the petitioners in the foregoing petition, and that the facts set out in said petition are true.

J. W. CUMMING.

Sworn to and subscribed before me this 20th day of September, 1897.

H. P. SHEWMAKE,
N. P., Richmond Co., Ga.

STATE OF GEORGIA,
Richmond County.

Personally appeared James S. Harper, and on oath says that he is one of the petitioners in the foregoing petition, and that the facts set out in said petition are true.

J. S. HARPER.

Sworn to and subscribed before me this 18 day of September, 1897.

G. BARRETT,
Not. Public, Richmond Co., Ga.

IN CHAMBERS AT AUGUSTA, GA., *Sept.* 21, 1897.

Read and sanctioned. Let this petition be filed and copies thereof and of this order be served forthwith upon Charles S. Bohler, tax collector of Richmond county, Georgia, and the board of education of said county, who will show cause before me, at the court-
6 house of said county, on the 4th day of October, 1897, at 10 o'clock a. m., why the relief in said petition should not be granted.

E. H. CALLAWAY,
J. S. C., A. C.

STATE OF GEORGIA,
Richmond County.

J. W. CUMMING ET AL.
vs.
COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY *et al.* } Process.

To the sheriff of said county, Greeting:

The defendants, Board of Education of Richmond County and Charles S. Bohler, tax collector of said county, are hereby required, in person or by attorney, to be and appear at the superior court next, to be holden in and for the county aforesaid, on the third Monday in October, 1897, then and there to answer the plaintiff in action of petition, etc. *As* in default of such appearance, said court will proceed thereon as to justice may appertain.

Witness the Honorable E. H. Callaway, judge of said court, this 21 day of September, eighteen hundred and ninety-seven.

GEO. B. POURNELLE,
Deputy Clerk.

STATE OF GEORGIA,
Richmond County.

I have this day served the defendant with a copy of the within petition, order, and process by delivering a copy personally to W. C. Jones, president board of education of Richmond county, also delivering a copy personally to C. S. Bohler, tax collector, R. C., this Sept. 23, 1897, at 9.50 o'c.

E. E. PRITCHARD,
D. S., R. C., Ga.

Filed in office this 21st day of September, 1897.

GEO. B. POURNELLE,
Deputy Clerk.

7 J. W. CUMMING ET AL.
vs.
THE BOARD OF EDUCATION OF RICHMOND COUNTY ET AL.

The above-stated cause coming on to be heard under the rule to show cause, returnable this day, and it appearing to the court that petitioners desire a continuance, on account of the sickness of Salem Dutcher, Esq., their leading counsel, it is ordered that an adjournment be had until the 15th day of October, 1897.

It is further ordered that all pleadings and affidavits to be used in said cause be filed with the clerk of the superior court by Monday, October 11th, 1897, and that all counter or cross affidavits be filed with the clerk by Thursday, October, 14th, 1897.

This October 4th, 1897.

E. H. CALLAWAY,
J. S. C., A. C.

J. W. CUMMING ET AL.
vs.
THE BOARD OF EDUCATION OF RICHMOND COUNTY *et al.* } Injunction.

It appearing to the court that Salem Dutcher, Esq., is still physically unable to attend court, and motion being made in behalf of the plaintiffs for a continuance—

It is ordered that each of the cases be set down for hearing before the court on the 10th day of November, 1897.

This Oct. 15th, 1897.

E. H. CALLAWAY,
J. S. C., A. C.

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CUMMING ET AL.
vs.
THE BOARD OF EDUCATION ET AL. } Injunction.

The court being engaged in the hearing of criminal cases, it is ordered that the hearing set for today of the above-stated cases is hereby adjourned over to 10 a. m., November 24th, 1897; that in the interim either party shall be at liberty to file any original affidavits, but the same shall be filed and notice thereof served upon the opposite side by November 17th, and each side shall have until November 22nd to file replies thereto.

This November 10th, 1897.

E. H. CALLAWAY,
J. S. C., A. C.

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Richmond Superior Court.

J. W. CUMMING ET AL.
vs.
THE BOARD OF EDUCATION OF RICHMOND County & Charles S. Bohler, Tax Col'r. } Petition for Injunction.

And now comes the defendant Charles S. Bohler, tax collector of Richmond county, in response to the rule served upon him, and, in answer to the petition, says:

Demurrer.

1. That the plaintiffs have not, in and by their petition, made such a case as entitles them in a court of equity to any relief from or against this defendant as to the matters contained in the petition or any of such matters.

2. Because the plaintiffs make no such case as will authorize judicial interference by injunction with the system of taxation established by his codefendant in conformity to the law of its creation, to wit, the act approved August 23rd, 1872, "to regulate public instruction in the county of Richmond," and the amendments thereto.

Answer.

3. To paragraph 1 defendant admits the petitioners are citizens of the State and residents of the county of Richmond; that he is required to collect the taxes fixed by the State, county, and the county board of education upon the property appearing upon the tax digest of 1897, as turned over to him for collection; that J. We. Cumming appears as a tax-payer to the amount of $2,080.00, James S. Harper to the amount of $2,550.00, and John C. Ladeveze, in proper person, to the amount of $5,900.00, and that as such tax-payers they are liable to all lawful taxes levied by the State or its authority.

4. He admits the averments in paragraph 2 of the petition are true according to his statement thereof.

5. In answer to paragraph 3, he admits that on the 11th day of July, 1897, the board levied for the year 1897 against all the legal tax-payers in the county a tax of forty-five thousand dollars, being two and two-tenths mills, and that defendant is proceeding to collect the same; that he annexes hereto, marked Exhibit "A," a copy of the certificate furnished to him as his authority in the
10 premises, and Exhibit " B," certificate on the digest in his hands, but that beyond this he has no information in the premises; that the amount that will be due under this assessment upon the property appearing on the digest will be by the plaintiff J. W. Cumming, $4.58; James S. Harper, $5.61, and John C. Ladeveze, $12.98, making a total of $23.17, and that he will proceed to collect it unless restrained by this court.

6. In answer to paragraph 4, defendant says that he has no information as to the amount of the tax levied for the support of the primary, intermediate, and grammar school systems, to which plaintiffs oppose no objection, nor of the amount of taxes levied for the support of the system of high schools in the county, which they controvert, nor does he know that ten per cent. of the amount so levied and to be collected by him is for the support of high schools. Defendant can neither admit nor deny other averments because of the want of sufficient information.

7. That defendant can neither admit -or deny the averments contained in paragraphs 5 and 6 because of the want of sufficient information, defendant being advised that these relate to matters at issue between the plaintiffs and his codefendants, in which he has no concern whatever.

8. Further answering in his own behalf, defendant says that he is a public officer under bond for the discharge of the duties of his office; that he is advised it is his duty to proceed to collect from each of the tax-payers of the county whose names appear upon the digest of 1897 the tax required at his hands by his codefendant, as set out in Exhibit "A," annexed hereto, and that he has no information as to any apportionment thereof nor any way of ascertaining how much is to be applied to the support of high schools, so as to retain that amount of money in conformity to the rule issued in this cause or to abide the judgment of the court in the premises. Defendant says that on the 12th day of December, 1883, there was filed in the clerk's office of this court by William H. Smith and others a bill in equity against John A. Bohler, the predecessor in office of this defendant, seeking to enjoin the collection of a tax imposed by the county board of education for the year 1883 and directed to be collected under a certificate from the county board of education, dated August 27, 1883, identical in char-
11 acter and terms as Exhibit "A" and " B," hereto annexed; that to this petition an answer was made by defendant's predecessor, and upon hearing of the cause a decree was entered, January 19th, 1884, in which the court said as to the matter of high schools " that that was covered by the general power to regulate public instruction. The constitution of 1868 is not restrictive as to grades. The constitution of 1877 and the debates in the con-

vention clearly indicate what the former meant." That a bill of exceptions to the supreme court of Georgia was sued out to this decision by the plaintiffs, the said bill served upon defendant's predecessor, and thereafter a decision was rendered in the supreme court, May 3rd, 1884 (72 Georgia Reports, p. 546), affirming the judgment of the court below; to the record in which cause as to file in this court reference is hereby made as if annexed hereto.

And this defendant pleads the said judgment in bar of any suit in equity or at law at the instance of any tax-payer to prevent him from obeying the mandate of the board of education and making collection of the taxes in conformity thereto; and having fully answered, defendant prays to be hence discharged with his reasonable costs and charges in his behalf sustained.

CHAS. S. BOHLER,
Tax Collector, R. Co., Ga.

AUGUSTA, GA., *September 1st*, 1897.

To Charles S. Bohler, tax collector, Richmond county, Georgia:

I hereby certify that — a regular meeting of the Richmond county board of education, legally held on the 11th day of July, 1897, it was voted in accordance with the law (two-thirds of all the members concurring therein) that the sum of forty-five thousand dollars ($45,000) be raised in said county of Richmond for public-school purposes for the year 1897, and that a tax sufficient to realize the same be levied, the same tax being two and two-tenths ($2\frac{2}{10}$) mills on every dollar of property taxable of the legal tax-payers of said county.

12 In obedience to the order of said board and in pursuance of the law, I do hereby assess and return a tax against all the legal tax-payers in said county, in pursuance of the law entitled "An act to regulate public instruction in the county of Richmond," approved August 23rd, 1872, and I hereby place in your hands a copy of my assessment and return of said tax against all the legal tax-payers in said county of Richmond, made out by me in pursuance of law.

You are hereby directed to collect said tax and deposit it to the credit of the Richmond county board of education, in such bank in the city of Augusta as may be designated by the State commissioner for the deposit of the county school fund.

In witness whereof I have hereunto set my official hand and affixed the seal of the said board this the 1st day of September, 1897.

[SEAL.] LAWTON B. EVANS,
Sec't'y B'd Education & ex Of. Sch. Com'r Rich. Co.

EXHIBIT B.

Entry on the Tax Digest, 1897.

STATE OF GEORGIA,
Richmond County.

I hereby certify that the within and following is a true copy of the assessment and return made out by me in pursuance of law and resolution of the Richmond county board of education against all the tax-payers of the county of Richmond for tax for public-school purposes and said county for the year 1897, the said assessment being $22,433,175.00, and the rate on the same being two and two-tenths (2 $\frac{2}{10}$) mills on every dollar of property.

In witness whereof I have hereto set my official hand and the seal of the board of education of Richmond county, this first day of September, 1897.

LAWTON B. EVANS,
Sec'ty B'd Education and ex. Of. Co. Sch. Com. R. Co.

13 STATE OF GEORGIA,
Richmond County.

You, Charles S. Bohler, tax collector of Richmond county, do swear that the facts set forth in the foregoing answer are true.

CHAS. S. BOHLER,
Tax Collector, Richmond Co., Ga.

Sworn to and subscribed before me this 29th day of September, 1897.

G. FRANK BOHLER,
Notary Public, R. Co., Ga.

Filed in office Octo. 9, 1897.

GEO. B. POURNELLE, *D. C.*

14 GEORGIA,
Richmond County.

In Superior Court of said County, October Term, 1897.

J. W. CUMMING, JAMES S. HARPER, and John C. Ladeveze
vs.
THE BOARD OF EDUCATION OF RICHMOND County *et al.*

Petition for Injunction and Relief. Rule to Show Cause.

Return to Rule.

1. In answer to the rule to show cause why the injunction in the petition prayed for should not be granted, defendant says:

(*a.*) Because there is no equity in the petition.

(*b.*) Because the allegations of the petition so far as they are

substantial are in the following answer sworn off, explained, and denied.

2. In order to understand the system defendant annexes as Exhibit "X" an extract from the public reports of the board.

Answer.

(Par. 1, 2, 3.)

3. The allegations in the first and second paragraphs are admitted and all of the third, save so much as implies that the high schools of respondent are under regular systems.

4. This defendant denies that it has established any system of high schools in said county, and answering in denial of this allegation defendant says that it is neither made its duty nor has it authority under the organic law to establish such systems (see section 10, act of August 23, 1872); that under said section it may in its discretion establish high schools at such points in the county as the interest or convenience of the people may require.

15 That in pursuance of said authority it had established the Neely high school Jan. 22, 1876, and changed its name for the Tubman high school on June 3rd, 1878, when Mrs. Emily H. Tubman presented to the board a large lot and building for the purpose of affording a higher education to the young women of the county. The Richmond academy afforded this benefit and advantage to the male sex. The call was loud and the want great for the continuance of this school by this respondent, and it was so accordingly determined. Each pupil to pay fifteen dollars for tuition per annum; non-residents of the county, *firty* dollars, this charge being the same as that made by the Richmond County Academy for Boys. The property was donated by Mrs. Tubman upon the express condition that in the event the board failed to use the building for a high school the same was to enure instantly to the benefit of the Richmond academy and the Augusta free school. The value of this property, with the fixtures, furniture, and appliances, is now not less than thirty thousand dollars.

In June, 1876, the board thought it wise to give its assistance to the Hephzibah high school, being a school conducted and controlled by the Hephzibah Baptist Association in the village of Hephzibah, in the southeastern portion of said county, charging and receiving for high-school scholars the sum of fifteen dollars per annum.

Thereafter, in 1880, there being no high school in the county for — colored race, and the funds of this defendant justifying it, and other schools of lower grade being established by the local trustees in the city of Augusta sufficient to accommodate the colored children, the board deemed it wise and proper to establish the Ware high school, charging for each pupil taught therein ten dollars per annum.

At meeting in June last of the board a special committee was raised to investigate the status of the high schools, with instructions

to report to the July meeting of the board, and submit such recommendations as in its judgment might be proper and necessary.

This committee held divers meetings and made a thorough investigation, as instructed, and duly reported to the July meeting. These reports are attached as exhibits hereto. Touching the Ware high school, its friends and the colored patrons thereof were called before the committee, and were heard by the committee with
16 every respect and consideration. They were told the reasons that controlled the committee in its intention to recommend its discontinuance for the present. These were: Because four hundred or more of negro children were being turned away from the primary grades unable to be provided with seats or teachers; because the same means and the same building which were used to teach sixty high-school pupils would accommodate two hundred pupils in the rudiments of education; because the board at this time was not financially able to erect buildings and employ additional teachers for the large number of colored children who were in need of primary education, and because there were in the city of Augusta at this time three public high schools—the Haines industrial school, the Walker Baptist Institute, and the Payne Institute—each of which were public to the colored people and were charging fees no larger than the board charged for pupilage in the Ware high school.

Attached hereto are the reports of said committee, which were made to the last July meeting of the board, touching each of the high schools under this board, and which upon full consideration were adopted, marked "A," "B," and "C." At the same time when the vote was taken on the report of the Ware high school it was unanimously resolved that the board of education reinstate the said school whenever in their judgment the board could afford it. See Exhibit "D." Subsequently to the board's temporary suspension of the Ware high school a number of colored people petitioned the board for rescission of this action, among whom were the complainants herein. A full board was called and convened on the — day of August, and the petitioners were heard and their request fully considered. The board, after a session and deliberation of over two hours, refused to rescind for the reasons heretofore set out, and says, in their view, until the local trustees—*i. e.*, the city conference board—should have furnished a sufficiency of primary schools for the colored population it would be unwise and unconscionable to keep up a high school for sixty pupils and turn away three hundred little negroes who are asking to be taught their alphabet and to read and write. No part of the funds of this board accrued or accruing and no property appropriated to the education of the negro race has been taken from them. Thi*d* board has only applied the same means and moneys from one grade of their education to another grade; and in this connection defendant
17 says that the enrollment in the colored school is this year 238 more than the last, the Ware high school building accommodating 188 pupils. See Exhibit "E."

Defendant admits that the cost of the high school will be about $4,500.00 for the present fiscal year.

5. The financial condition of the board is as follows:

Indebtment	$31,000.00
Cash on hand	204.00

It denies, therefore, that it has in hand twenty-two thousand dollars; admits it will receive during the fiscal year from the tax levy, the poll tax of the county, and the State educational fund a considerable revenue, but hardly sufficient to conduct its business.

This board has always exercised the power of establishing, suspending, and abolishing high schools according to its means and as the interest, convenience, and wants of the people might require. At one time and another it has had conducted five high schools, to wit, a boys' high school at the Richmond academy, the Tubman High School for Girls, the Hephzibah High School for Boys and Girls, and the Summerville High School for Boys and Girls.

The school in Summerville was abolished June 1, 1878, when the trustees of the Summerville academy received possession of the income devised for the support of teachers under the will of William Robertson. The trustees of the Richmond academy having resumed full control over that institution July 1, 1878, and established their own school, the high school for boys taught under the direction of this board was discontinued and never re-established. On November 1, 1880, the high school for colored children—*i. e.*, the Ware high school—was opened.

Respondent denies that the levy of the tax for the high schools now under the board, to wit, the Tubman and the Hephzibah, are illegal and void. It denies the proposition that because this board has not at this time a high school for the colored race these two schools must be discontinued, and that the tax levied for their support is illegal.

This board admits it is the owner of large school properties and school fixtures and equipments, but denies that it may not use the same for the purpose of carrying on its high schools, and admits it is now using its funds and some of its property to carry on the Tubman and Hephzibah high schools, and intends to con-
18 tinue to do so until the court shall declare the same illegal.

6. The respondent admits that petitioners are persons of color, but has no information touching their having children or their ages. It denies it has ever conducted any system of high schools wherein the same character of schools was given to the colored people as to the white; and, answering, says that under the act of 1872 it is nowhere declared that this board shall maintain the same grade of schools for the two races; that section 9 of said act commands the local trustees to provide the same facilities to each race as regards school-houses and faxtures, attainments and abilities of teachers and length of term, but that this section refers only to the schools established by the trustees of each school district under section 6 of said act, and does not apply to schools of higher grade;

that section 10 of said act, which empowers this respondent to establish schools of higher grade than those established by the local trustees, ordains their establishment to such as the interest and convenience of the people may in the judgment of this board require.

It admits that on the 10th day of July last it suspended the Ware high school for the reason that in its judgment its interest and convenience of the people did not require it, and that it caused to be established it its stead three primary schools for colored children, and for reasons heretofore in this answer set forth. Whether or not the petitioners at the time of said supension had children attending the Ware high school this defendant is not advised, but denies that they are debarred from a high-school education in this community, since for the same charges as were made by this board for pupilage in the Ware high school they can find this education in three other colored high schools open to the public in the city of Augusta.

Defendants deny the allegations specially plead that the acts of 1872 and 1877 deny to the colored race equal protection of the law, or that the course and conduct of this board thereunder is obnoxious to this constitutional inhibition.

7. This defendant, having fully answered and shown that plaintiffs have no wrong or grievance, legal or equitable, pray the rule be dismissed with costs and defendants be herewith discharged.

And your respondent-, etc.

GANAHL & GANAHL,
Att'ys for Respondents.

19 EXHIBIT X.

General Information Concerning the Public-school System of Richmond County for the Instruction of Teachers and the Benefit of the Public.

The board of education consists of thirty-six members, three from each of the five city wards, five country districts, two incorporated villages, and the ordinary of the county, *ex officio*. Members must be freeholders and residents of the county. The term of office is three years, and an election occurs every November to fill the vacancies on the board, the term of one-third of the members expiring annually. The board meets regularly on the second Saturday in each month, and the president is chosen from among its members. The secretary, who is also the county school commissioner, is chosen annually at the meeting in January.

The schools in each district and village in the county are under the entire control of the local trustees. The teachers are chosen by them, the length of the term is regulated by them, and all matters pertaining to the schools are referred to them, under regulations of the board of education. In the city, the schools are under the charge of the conference board of city trustees, which consists of all the members from the five wards, of which the president is chairman.

The school fund at the disposal of the board is annually divided according to the school population among the city wards, the five country districts, and the two villages, after reserving a fund for the general expenses of the board and for the high schools. By this means each set of local trustees can see the amount at their disposal and can regulate their schools accordingly. They can have few or many teachers, a long or a short term, build and repair just as they please and as their funds permit.

Each district, village, and the city wards run a separate set of schools, and yet the whole system is controlled by one board of education, and the actions of the various local trustees are under the supervision of suitable committees from the general board.

20 The secretary and county school commissioner is in general charge of the whole. The teachers in the high schools are chosen by the entire board of education. Those in the city schools are chosen by the conference board of the city trustees, which consists of the 15 members from the 5 wards. Those in the country districts are chosen by the local trustees in which the district is situated.

EXHIBIT A.

Report of Committee on Tubman High School.

AUGUSTA, GA., *July 10th*, 1897.

To the board of education:

The committee appointed to investigate the condition of the high schools and to make such recommendations as they deem wise beg leave to make the following report on the Tubman high school:

This building is the generous gift of Mrs. Emily Tubman, made to the board of education over twenty years ago for the purpose of affording a higher education to the young ladies of our city. The building has been very much enlarged and improved at the expense of the board. The school has grown in numbers every year until now about 200 pupils are on the roll. Mr. John Neely is the principal of the school and is assisted by Miss Mary A. Coffin, Miss A. B. Coffin, Miss Zoe Barclay, Miss Elizabeth Vannerson; in addition there is a department of French by Madame Esmery, of stenography and typewriting by Miss De Hay. Music and penmanship are taught in the school by the regular directors of those branches in the city schools.

It is not amiss for your committee to say that they recognize the necessity of a high school for girls, to be operated by the board of education, because there is no other sufficient institution of this kind in the city. The Richmond academy in our city is a high school where the boys of our schools can attend. There are high schools for the accommodation of the negro boys and girls, and so the necessity for providing for the education of the white girls of the city is the one need that the board of education cannot escape. This is a sufficient reason for maintaining the Tubman high school.

21 Your committee bears cheerful testimony to the faithful performance of all duties devolving upon the principal and

his assistants. They have been devoted to the work, and the popularity of the school is a sufficient evidence of its efficiency. Your committee unanimously reports that the status of the Tubman high school is satisfactory and that the present management be continued.

Respectfully submitted.

JOS. GANAHL.
W. C. JONES.
W. H. BAXLEY.
W. A. LATIMER.
W. F. ALEXANDER.
J. L. FLEMING.
L. B. EVANS.

EXHIBIT B.

Report of Committee on Hephzibah High School.

Report.

The committee to whom was referred the investigation of the status of the high school under this board and their relation thereto, with instruction to report to the July meeting of the board and submit such recommendations as in its judgment may be proper or necessary, make the following report:

Hephzibah high school.

Your committee find that the board of education of Richmond county commenced relations with this school in 1871, when Mr. Lowery Carswell was the principal thereof. It was theretofore from 1860, when first instituted, exclusively conducted and controlled by the Hephzibah Baptist Association.

Mr. Carswell informs your committee, no minute of the matter appearing in the records of this board, that it was agreed between the board and the association that the latter should select and
22 nominate a teacher for the school, and the board should, if the nominee were satisfactory, elect him to the position; that this teacher should be paid six hundred dollars per annum from the funds of the board; that tuition fees of $15 p'r annum should be collected by the teacher from the pupils, which sums were to be credited to the six hundred dollars. In this way the expense of the high school would be reduced to about $300.00 per annum. The principal was allowed to charge full tuition fees for pupils residing out of Richmond county without an accounting for the same to the board.

Since that time the board has agreed to pay to a teacher of vocal music the sum of $20 p'r month for 9 mos., or a total of $180.00 p'r annum.

This contract and relation has continued on and exists to this day. Mr. Carswell was succeeded by Mr. Ellington, and Mr. Ellington by Mr. C. H. S. Jackson, the present incumbant, who has held the position for twelve years past.

The association owns the building in which the school is conducted. This board owns the school furniture, pays insurance on furniture and building, keeps the building in repair, and pays salary of janitor.

Besides these the principal receives from the local trustees of Hephzibah village $540 p'r annum; from 121st district, $400; from 124th district, $61.00, making a total of $1,601.00, which sum added to insurance, $25; janitor, $72, and music, $180, makes a grand total of $1,878.00, which this board and the local trustees pay annually towards the support of this school.

The principal is nominated to this board by the local trustees of Hephzibah district. He appoints his own corps of assistants with the approval of these local trustees. This corps at present consist of R. E. Cobb, Esq., musical director; Miss Sarah A. Kilpatrick, primary department; Miss Slara M. Sego and Miss Baker, intermediate department; Miss Sarling, elocution; Miss Hattie E. Carswell, art department.

The assistants do not desire any qualification from examinations and certificates demanded by this board or other of its teachers.

The school is a very large one. From the report made to Hephzibah Baptist Association in October last, we find the enrollment reached in 1896 to the number of 299 pupils.

23 After a searching inquiry your committee have reached the conclusion that the school in all its grades is excellent, giving with intellectual development exemplary moral training to religious example, and that the cause of education is advanced to the full value of the moneys paid out by this board.

The situation is anomalous, and is hardly consistent with the scheme upon which the public-school system of Richmond county was instituted by act of 1873 and subsequent amendments.

The scheme was for this board and the local trustees thereof to conduct and maintain their own schools exclusively, not to support private or other educational institutions of the county.

It is easy to discover errors. It is difficult to provide a remedy, for it so happens that the remedy often is worse than the disease.

To withdraw our pecuniary support from the Hephzibah school at a time we are not financially competent to provide another of equal value to the cause of education would work greater wrong than to allow the anomaly to continue.

Your committee therefore advise that for the present no action changing the present status and relation of the Hephzibah high school towards this board be taken.

They opine, however, that the school should come more strictly under the discipline and superintendence of this board. To this end your committee recommend that the assistants of the school be required to undergo due examination and obtain the certificates required of other schools under our system; that the curriculum of its departments and the text books used be submitted to the secretary of this board and our text-book committee, and that the corps

of teachers be submitted to this board for election, as is the principal of the school.

Resp'y, &c.,

JOS. GANAHL.
W. C. JONES.
W. H. BAXLEY.
W. A. LATIMER.
W. F. ALEXANDER.
JAS. L. FLEMING.
L. B. EVANS.

24 EXHIBIT C.

Report of Committee on Ware High School.

AUGUSTA, GA., *July 10th*, 1897.

To the board of education:

The committee appointed to investigate the status of the high schools of the city and county to ascertain the relation they sustain to the board of education, and to make such recommendations thereon as in their judgment seem wise and necessary, beg leave to make the following report and recommendations regarding the negro high school known as the Ware high school:

This school has been in operation under the board of education for the past fifteen or sixteen years. It was first under the charge of one teacher, Richard R. Wright, and was located on upper Reynolds street. When Wright resigned, four or five years ago, he was succeeded by Henry L. Walker, the present incumbent, and the school was moved to the corner of Twiggs and Walker streets. The number of pupils increased to about sixty and an additional teacher was added as an assistant to the principal. The school has been in a very prosperous condition and the principal and his assistant have done faithful and satisfactory work so far as their teaching is concerned. The principal of the school is paid $807.50 and the assistant $340, the janitor is paid $45, incidental expenses about $100, making a grand total of expense of $1,292.50. The tuition fees amount to ten dollars a year for each pupil. The amount collected this year has been about $450. This makes a net cost of the school of $842.50.

Your committee has been informed that four or five hundred negro children are annually turned away from the primary grades of the city schools because they are unable to find seats. The board of education is not able to erect additional buildings and employ additional teachers for the accommodation of this large number of negro children who desire to obtain the rudiments of an English education. A very natural inquiry suggesting itself to our committee is whether it would not be best to take the $842.50, which represents the net cost of running the negro high school, for
25 the benefit of about 60 pupils who desire to study the higher branches, and with it employ four primary teachers who would teach about 250 pupils the rudiments of an education. It certainly seems wise to give as many negro children the advantage

of a primary education as possible and teach them all to read and write and calculate rather than advance a few of them through the high schools. If the Ware high school be abolished by the board of education the same money that it now costs will accommodate 250 more children in the primary schools.

Your committee observes the fact that there is no lack of high schools for negro children in the city. There is the Haines industrial school, the Walker Baptist Institute, and the Payne Institute, all designated for the higher education of negro boys and girls. While these are denominational schools, yet the fees they charge are moderate, and it is not in evidence that their teaching is sectarian. Your committee believes that all of the students now attending the negro high school can be accommodated in these schools without additional expense to them, thus leaving the board to divert its funds to the primary education of the race.

Your committee believes that the board of education is not liable to maintain the negro high school and also extend the negro primary schools. The lack of funds forbids this, and we are confronted with the question of the best disposition of the money in hand. Having heard from the principal of the school and other members of the colored race, and having carefully considered the questions in all its bearings, your committee makes the following recommendation:

1st. That the high school for negro children known as the Ware high school be discontinued by this board. This is not to be considered as a reflection upon the ability, or faithfulness, or character of the work done by the teachers in charge, but is *not* purely economic reasons in the education of the negro race.

2nd. That the city conference board be requested to open four primary schools in the same building at a cost of about $200 apiece for the accommodation of those negro children who are annually denied admittance to the schools.

Respectfully submitted.

JOS. GANAHL.
W. C. JONES.
W. H. BAXLEY.
L. B. EVANS.
W. A. LATIMER.
W. F. ALEXANDER.
J. L. FLEMING.

26 EXHIBIT D.

Extract from the Minutes of the Board of Education, July 9th, 1897.

"After the reading of these reports of the special committee on high schools it was agreed to vote upon the adopting of these reports.

The report on the Tubman high school was unanimously adopted.

Mr. Joel Smith moved to lay the report of the Ware high school on the table. This motion was not seconded.

The vote was then taken on the report of the Ware high school, and it was adopted. Mr. Joel Smith voted in opposition, and desired his vote recorded.

Mr. Tischer moved that the board of education reinstate the Ware high school whenever in their judgment the board could afford it. This motion was carried."

EXHIBIT E.

Enrollment in Colored Schools.

1897.

1st ward colored school	574	
2nd " " Ware High School building	188	
5th " " school	110	
Mauge St. " "	713	
		1,585

1896.

1st ward colored school	481	
5th " " "	108	
Mauge St. " "	693	
Ware high " "	65	
		1,347
Excess 1897 over 1896		238

27 In witness of the foregoing answer, the board has caused to be hereunto affixed its corporate seal.

RICHMOND COUNTY BOARD OF EDUCATION,

[SEAL.] By W. C. JONES, *President.*

STATE OF GEORGIA, }
Richmond County. }

Personally appeared W. C. Jones, Jas. L. Fleming, & W. A. Latimer, who, being duly sworn, say that they are members of the board of education of Richmond county; that the facts set forth in the foregoing plea are true; that what is contained in the answer, so far as concerns their own act and deed, is true, to their own knowledge, and what relates to the act and deed of any other person they believe to be true; that the foregoing defense as it stands stated is true, to the best of their knowledge and belief.

W. C. JONES.
JAS. L. FLEMING.
WM. A. LATIMER.

Sworn to and subscribed before me—
A. S. JONES,
Notary Public, Richmond Co., Ga.

Filed in office October 9th, 1897.

GEO. B. POURNELLE,
Deputy Clerk.

28 Richmond Superior Court, Oct. Term, 1897.

CUMMING ET AL.
vs.
BOARD OF EDUCATION ET AL. } Injunction.

And now, upon the coming in of the answer of said board, come plaintiffs and say:

1st. That "the Payne Institute," "the Walker Baptist Institute," and "the Haines Normal and Industrial Institute" mentioned in said answer are purely private and pay educational institutions under sectarian control, and have been in existence for years past and have no connection and never have had any connection whatsoever with the public-school system conducted by said board.

2nd. That said board has no legal right to charge for extending a public high-school education to the children of school age of actual residents of said county.

3rd. That if a deficiency of means exists for extending a public primary school education to the colored school population of the city of Augusta in said county, said deficiency is due to the illegal action of said board in appropriating to the white school population of said city largely more of the public-school fund than it is legally entitled to, to the corresponding detriment of the colored school population of said city, and but for such illegal action there would be no such deficiency as said board avers.

4th. That in nothing herein said do plaintiffs in anywise abate or qualify the averments of their original petition, but, upon the contrary, in all things reaffirm and stand upon the same.

SALEM DUTCHER,
HAMILTON PHINIZY,
JOE S. REYNOLDS, *Pl'ffs' Att'ys.*

Filed in office Nov. 17, 1897.

GEO. B. POURNELLE, *D. C.*

29 CUMMING ET AL.
vs.
BOARD OF EDUCATION, RICHMOND COUNTY, *et al.* } Injunction.

And now comes the defendant and demurs in law generally and specially to the amendment filed by plaintiff in the above-stated case November 17th, 1897, upon the following grounds, to wit:

1. Because paragraph two is an averment of illegal conclusion without setting forth the grounds of illegality.

2. Because the matter set forth in paragraph three is an averment of illegal action without stating the grounds of such illegality.

3. Because the whole petition as now amended sets forth no cause of action entitling the plaintiff to any relief, and the petition as

amended is contradictory to and inconsistent with the averments in the original petition and the relief prayed therein.

GANAHL & GANAHL,
FRANK H. MILLER,
D'f't's Att'ys.

Nov. 24, '97.

30 J. W. CUMMING ET AL.
—
THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY ET AL.

STATE OF GEORGIA,
Richmond County.

Personally appeared J. W. Cumming and on oath says that he is now and has been a resident of said State and county for ten years and longer; that he is the father of one unmarried child, named Maud, between the age of sixteen and seventeen years, who was attending the Ware high school of said county when said school was abolished, and is now waiting to enter said child in a high school when furnished by the county board of education of Richmond county to the colored race; that no facilities for a high-school education *has* been furnished him by said board since the Ware high school was discontinued by said board.

J. W. CUMMING.

Sworn to and subscribed before me this 25th day of September, 1897.

FRED. T. LOCKHART,
Notary Public, R. Co., Ga.

31 J. W. CUMMING ET AL.
VS.
THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY ET AL.

STATE OF GEORGIA,
Richmond County.

Personally appeared J. S. Harper and on oath says that he is now and has been a citizen of said State and county for ten years and longer; that he is the father of one unmarried child, name-Emily, between the ages of twelve and fifteen years, who was attending the Ware high school of said county when said school was abolished, and is now waiting to enter said child in a high school when furnished by the county board of education of Richmond county to the colored race; that no facilities for a high-school education *has* been furnished him by said board since abolishing the Ware high school.

J. S. HARPER.

Sworn to and subscribed before me this 25th day of September, 1897.

FRED. T. LOCKHART,
Not. Pub., Rich. Co., Ga.

32 J. W. CUMMING ET AL.
vs.
THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY ET AL.

STATE OF GEORGIA,
Richmond County.

Personally appeared J. C. Ladeveze and on oath says that he is now and has been a citizen of said State and county for ten years and longer; that he is the father of one unmarried child, name-Anna B., between the age- of fifteen and sixteen years, who was attending the Ware high school of said county when said school was abolished, and is now waiting to enter said child in a high school when furnished by the county board of education of Richmond county to the colored race; that no facilities for a high-school education *has* been furnished by said board since abolishing said school.

J. C. LADEVEZE.

Sworn to and subscribed before me this 25th day of September, 1897.

WM. H. BARRTETT,
Not. Pub., Richmond Co., Ga.

33 J. W. CUMMING, JAS. S. HARPER, & JOHN C. LADEVEZE
vs.
THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY and Charles S. Bohler, Tax Collector.

STATE OF GEORGIA,
Richmond County.

Personally appeared Albert S. Blodgett and on oath says that he is now and has been for six years a resident of said State and county; that he is the father of one unmarried child, name-Frank, between the age- of six and sixteen years, who was attending the Ware high school of said county when said school was discontinued, and is now waiting to send said child to a high school when furnished by the county board of education of Richmond county to the colored race; that no facilities for a high-school education have been furnished him by said board since abolishing the Ware high school.

ALBERT S. BLODGETT.

Sworn to and subscribed before me this 29th day of September, 1897.

FRED T. LOCKHART,
Not. Pub., R. Co., Ga.

34 J. W. CUMMING, JAS. S. HARPER, & JOHN C. LADEVEZE
vs.
THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY and Charles S. Bohler, Tax Collector.

STATE OF GEORGIA,
Richmond County.

Personally appeared Jerry M. Griffin and on oath says he is and has been a resident of said State and county for ten years and longer, and that he is the father of one child, unmarried, name- Louise, between the age- of six and sixteen years, who was attending the Ware high school of said county when said school was abolished, and is now waiting to enter said child in a high school when furnished by the county board of education of Richmond county to the colored race; that no high-school facilities *is* now furnished by said board nor *has* been since the Ware high school was discontinued.

JERRY M. GRIFFIN.

Sworn to and subscribed before me this day, 9th of September, 1897.

H. P. SHEWMAKE,
Not. Pub., Rich. Co., Ga.

35 STATE OF GEORGIA,
Richmond County.

Personally appeared William J. White and on oath says that he is a person of color, a resident of and citizen of said State and county for over a quarter of a century past; that he is and has been editor of a weekly newspaper published in the city of Augusta, in said county, called the "Georgia Baptist," for seventeen years past; that he has been for thirty years past pastor of Harmony Baptist church in said city, and is well acquainted with the colored population of said city, and also the operations of the school board of said county since its inception, having attended its sessions regularly for many years and held frequent conferences with its officers and members on matters touching the educational welfare of said colored race.

Deponent says that for years past many colored children of said city have been annually denied admittance to the public schools of said county on the alleged ground of a deficiency of means by said board for their education. In one year deponent recalls that some six hundred were turned away, and this denial of a public education has been the occasion of frequent protest and remonstrances to said board by deponent and other representative men of the colored race.

Deponent says he is well acquainted with the three private colored schools in said city, namely, the Payne, Walker, and Haines Institute-; that they have been established many years, the latter since 1882 or 1885, and the others also for years past; that they are all private pay schools under denominational control and have no connection with the public-school system of said county and have always been independent of it; and, that as said public-school system is now

conducted it has kinde-garten schools, a night school, and primary, intermediate, grammar, and high schools at public expense for the white scholars of said city, and only primary, intermediate, and grammar schools for the colored.

Deponent says that owing to the fact that there is an opening for employment for many small white boys in the stores and other places of business in said city as cash boys, errand boys, &c., &c., and as there is also a large opening for employment of the white boys and girls in the numerous cotton factories in said city, more particularly in the fourth and fifth wards of the city where
36 half of the entire white school population of said county is located, and as the parents of such children largely put them to work, there is not the same earnest call for education for white children as there otherwise would be; but as the smaller colored children have no opening for employment accessible there is a great pressure on the part of their parents to get them in the public schools, an eagerness of long standing and frequently noted in the reports of said board.

Deponent says that he earnestly pressed upon said board the legal right of the colored children to a high-school education some sixteen or seventeen years since when one was established; that he personally saw and urged each member of said board to establish one, and says that the board did finally establish one after a committee of its number had reported that it was the legal duty of the board to do so and after the then county commissioner, Hon. William F. Fleming, had in his reports informed them that "the law upon the question is plain. Equal advantages must be given to both classes of citizens," and insisted upon a compliance with it. A copy of the committee report referred to deponent annexes to this affidavit.

WILLIAM J. WHITE.

Sworn to and subscribed before me this 16th day of Nov., 1897.

J. G. WEIGLE,
Not. Pub., Rich. Co., Ga.

37 *Questions Propounded to Lawton B. Evans, Esq., a Witness for the Plaintiff, who Refused to Make Affidavit.*

CUMMING ET AL.
vs.
BOARD OF EDUCATION.

1st. What is your official connection with the Richmond county board of education?

Ans. I am secretary of the board.

2nd. How long have you been such?

Ans. Since 1882; November, 1882.

3rd. Have you not been notified that $32,096.79, thirty-two thousand and ninety-six dollars and seventy-nine cents, is the quota coming to this board from the State education fund for the current school year?

Ans. Well, that is about right. I don't know about dollars and cents. It is in that neighborhood. I don't carry those figures in my mind. I would have to refer to the record. (On being shown book:) That is about right, sir; thirty-two thousand and something.

LAWTON B. EVANS.

Sworn to and subscribed before me November 24, 1897.

E. H. CALLAWAY.

38 *July Report of W. H. F., Sup't, P. S.*

JULY 10TH, 1880.

The sup't again feels compelled by a sense of duty to recommend the establishment of a high-school class for colored pupils. The law expressly says that while the white and colored schools shall be separate, the facilities shall be the same. The school ought to be given or the law ought to be repealed. To grant today the petition of the colored people would be only an act of tardy justice.

39 *Committee Report.*

OCT. 9TH, 1880.

To the hon. the board of education of Richmond county:

The undersigned, the high-school committee of your honorable body, to whom was committed the petition of W. J. White, L. H. Holsy, J. S. Harper, A. C. McClennon, Elbert Rogers, colored citizens, for the establishment of a high school for colored children, dated July 10th, 1880, respectfully report—

That they have assurance that there are forty-five colored children in the county who are prepared to enter a high school and pay therefor ten dollars for the scholastic year. A list of them is hereto annexed. It will require but a small amount of money to be added to the sum to be derived from this source to establish a high school for male and female children, and thus carry out the letter and spirit of our organic act.

They recommend, therefore, that the said high school be immediately organised by the election of a male teacher at a salary of $—— *dollars* per month; that the superintendent procure and furnish a room suitable for the purpose, and that said school be opened on the first day of November next.

Your committee would add that the city board having unanimously agreed on the propriety of establishing this school, they feel that the time has come when no valid objection can justly be urged against the action.

Very respectfully,

JOSEPH GANAHL.
M. J. CARSWELL.
MARTIN V. CALVIN.

40 J. W. CUMMING ET AL.
vs.
THE BOARD OF EDUCATION OF RICHMOND COUNTY ET AL.

JUNE 12TH, 1897.

The following resolution was offered by Maj. Ganahl and seconded by James L. Fleming:

Resolved, That a committee of five together with the president and secretary of the board as *ex officio* members be appointed by the president, whose duty it shall be to investigate the status of the high schools and their relation to the board of education with power to call for information upon the school trustees and the principal and teachers of the school. The said committee to report to July meeting of this board, and make such recommendations as in its judgment may be proper and necessary.

Committee: Ganahl (chairman), Fleming, Baxley, Latimer, Alexander, Jones, and Evans *ex officio*.

Report of Committee on Ware High School.

JULY 10TH, 1897.

The committee appointed to investigate the status of the high schools of the city and county to ascertain the relation they sustain to the board of education and to make such recommendations thereon as in their judgment seems wise and necessary beg leave to make the following report and recommendations regarding the negro high school known as the Ware high school.

This school has been in operation under the board of education for the past fifteen or sixteen years. It was first under the charge of one teacher, Richard R. Wright, and was located on upper Reynolds street. When Wright resigned, four or five years ago, he was succeeded by Henry L. Walker, the present incumbent, and the school was moved to the corner of Twiggs and Walton Sts., the number of pupils increased to about sixty, and an additional teacher was added as an assistant to the principal. The school has been in a very prosperous condition, and the principal and his assistant have done faithful and satisfactory work so far as their teaching is concerned. The principal of the school is paid $807.50 and the assistant $340.00; the janitor is paid $45.00, incidental expenses about $100.00, making a grand total expense of $1,292.50. The tuition fees amount to $10.00 a year for each pupil. The amount collected this year has been about $450.00.

41 This makes a net cost of the school $842.50. Your committee has been informed that four or five hundred negro children are annually turned away from the primary grades of the city schools, because they are unable to find seats. The board of education is not able to erect additional buildings and employ additional teachers for the accommodation of this large number of negro children who desire to obtain the rudiments of an English education. A very natural inquiry suggest- itself to your commissioners is whether it would not be best to take the $842.50 which

represents the net cost of running the negro high school for the benefit of about sixty pupils who desire to study the higher branches and with it employ four primary teachers, who would teach about two hundred pupils the rudiments of an education. It certainly seems wise to give to as many negro children the advantage of a primary education as possible and teach them all to read and write and calculate, rather than to advance a few of them through the high schools.

If the Ware high school be abolished by the board of education, the same money that it now cost will accommodate 250 more children in the primary schools.

Your committee observes the fact that there are no lack of high schools for negro children in the city. There is the Haines industrial, the Walker Baptist high school, and the Payne Institute, all designed for the higher education of negro boys and girls. While these are denominational schools, yet the fees they charge are moderate, and it is not in evidence that their teaching is sectarian. Your committee believes that all the students now attending the negro high school can be accommodated in these schools without additional expense to them, thus leaving the board to direct its funds to the primary education of the race.

Your committee believes that the board of education is not able to maintain the negro high school and also expend the amount on the negro primary schools. The lack of funds forbids this, and we are confronted with the question of the best disposition of the money in hand. Having heard from the principal of the school and other members of the colored race, and having carefully considered the question in all its bearings, your committee makes the following recommendation:

1st. That the high school for negro children known as the Ware high school be discontinued by this board.

42 This is not to be considered as a reflection upon the ability or faithfulness or character of the work done by the teachers in charge, but is for purely economic reasons in the education of the negro race.

2nd. That the city conference board be requested to open four primary schools in the same building, at a cost of about $200.00 apiece, for the accommodation of those negro children who are annually denied admittance to the schools.

Resp't'ly submitted.

JOS. GANAHL (*Chairman*).
W. C. JONES.
W. H. BAXLEY.
W. A. LATIMER.
W. F. ALEXANDER.
J. L. FLEMING.
L. B. EVANS.

July 10th, 1897.

The vote was then taken on the report of the Ware high school, and it was adopted. Mr. Joel Smith voted in opposition and desired his vote recorded.

Mr. Fisher moved that the board of education reinstate the Ware high school whenever the board, in their judgment, could afford it. This motion was carried.

43 8. *Portions of the Printed Report of the Board for* 1896 *and* 1897.

Report of the secretary.

"It is needless to say again that the negroes everywhere crowd into the schools." * * * "The eagerness of this race for school privileges is remarkable and commendable."

Report of the finance committee.

Expenditures:

Salaries, high schools		(white)	$6,549.61
" " "		(colored)	1,057.50
" city "		(white)	36,222.05
" " "		(colored)	7,131.40
" country "		(white)	11,521.90
" " "		(colored)	6,092.08

By-laws of the board of education.

SECTION 3. Requiring the appointment of seven committees, namely, on finance, high schools, rules and regulations, text books, examination of teachers, and sanitary affairs, consisting of five members each.

SECTION 8. At the regular monthly meeting in July the board shall elect high-school teachers for the ensuing scholastic year.

Rules and regulations for the government of the public schools—Organization.

SECTION 1. The schools shall be divided into primary, intermediate, grammar, and high school grades.

SECTION 8. Examinations shall be regularly held in all the schools at the close of each term. These examinations may be oral or written, or both combined, at the discretion of the commissioner, but the final examination at the close of the scholastic year must be at least partly written in high schools and the last year of the grammar schools.

SECTION 12. The text books and course of study pursued in all the schools shall be such only as are prescribed by the board.

As to the county school commissioner.

SECTION 8. He shall certify to the high-school accounts in the same manner as the trustees of the wards and districts certify to claims and accounts against the schools in their respective jurisdiction.

44 Pupils.

SECTION 18. Non-resident children may be admitted to the schools on the payment of tuition in advance each term and provided there is room, so that they do not prevent the admission of resident pupils.

SECTION 19. All resident pupils applying for admission into the high schools shall pay in advance the sum of $7.50 per term for white schools and $5.00 for colored schools.

SECTION 20. All pupils upon completing the full high-school course shall receive certificates or diplomas, the form of which shall be prescribed by the board of education.

General information concerning the system.

The schools in each district and village in the country are under the entire control of the local trustees. The teachers are chosen by them. The teachers in the high schools are chosen by the whole board of education. A certificate of the first grade entitles a teacher to teach in the primary schools only; of the second grade to teach in the intermediate schools only, and of the third grade to teach in the grammar and high schools. There are no expenses connected with the schools except that of janitor's fees, which amount to about 75 cents a year for each pupil.

45 STATE OF GEORGIA, }
Richmond County. }

Personally appeared before the undersigned George Williams Walker, who, being duly sworn, says:

That he is the principal of the Payne Institute, a school located within the limits of the city of Augusta, in said county.

That said institute conducts an academic and a collegiate department with a full and competent corps of instructors; that the curriculum of said academic department is of equal grade with the curriculum of the Ware high school, and the curriculum of the collegiate department is higher; said school is open to all colored children of either sex; said institute has now in process of erection a building which will furnish ample accommodations for a much greater number of pupils in the high school and collegiate grade than have ever applied for admission.

That the tuition fee charged in said institute is eight dollars per annual term of eight months, beyond which there are no expenses connected with the attendance on said school, except for the purchase of books.

Said school was opened in 1884; that the said school is supported mainly by the income from an endowment presented by Mr. Moses Payne and by donations received through the M. E. Church, South, and the Colored M. E. Church in America; that the total income of said institute during the fiscal year ending May 31st, 1897, was $7,344.48, of which sum two hundred and three dollars and twenty-five cents was derived from tuition fees.

GEORGE WMS. WALKER.

Subscribed and sworn to before me this October 2nd, 1897.

E. B. BAXTER,
Not. Pub., Rich. Co., Ga.

46 J. W. CUMMING ET AL.
vs.
BOARD OF EDUCATION OF RICHMOND COUNTY ET AL.

Personally appeared before the undersigned, a notary public in and for said county, George A. Goodwin, who, being duly sworn, says:

That he is the principal of the Walker Baptist Institute, a school located just outside of the city of Augusta and in the county of Richmond.

That said institute conducts an academic department for higher education with a full and competent corps of instructors; that the curriculum of said academic department is of equal grade with the curriculum of the Ware high school.

Said school is open to all colored children of either sex and has accommodation for many more pupils than have been attending it. Each pupil is charged eight dollars per annual session of eight months, beyond which there are no expenses connected with attendance on said school except for the purchase of books.

That said school was established here in 1892; that the schoolhouse is a commodious building and well fitted up.

That the revenue of said school is derived from the Walker Baptist Association, which gives to the school five hundred dollars annually, and from John D. Rockfellow, who donates through the American Baptist Home Mission Society the further sum of five hundred dollars, and from donations from other sources amounting to about one thousand dollars per year.

That the income of said school for the fiscal year ending in June, 1897, was twenty-five hundred and ninety-eight dollars, of which sum the sum of five hundred and five dollars was derived from tuition fees and the balance from the sources above enumerated.

G. A. GOODWIN.

Subscribed and sworn to before me this Sept. 29th, 1897.

E. B. BAXTER,
Not. Put., Rich. Co., Ga.

47 STATE OF GEORGIA,
Richmond County.

Personally appeared Ref. Geo. W. Walker, who on oath says that he is principal of the Payne Institute, and that said institute is a Methodist school, supported by the Methodist Episcopal Church, South, and the Colored Methodist Episcopal Church in America; that it has no connection with the public-school system of Richmond county, and receives no support from said school system.

GEO. WMS. WALKER, *Pres't.*

Sworn to and subscribed before me this — day of October, 1897.
H. P. SHEWMAKE,
N. P., Rich. Co., Ga.

48 STATE OF GEORGIA, }
Richmond County. }

Personally appeared Lucy Laney, who, being duly sworn, says that she is the principal of the Haines industrial school, located on South Boundary, or Gwinett, street, of the city of Augusta; that the said school conducts an academic department for higher education, with a full and competent corps of instructors; that the curriculum of the said academic department is of equal grade with the curriculum of the Ware high school; that the school is open to all colored children of either sex, and has accommodations for all pupils that will attend it. Each pupil is charged $3 per annual term of 8 months, beyond which there are no expenses connected with attendance on the school, except for books.

That the revenue of the school is derived from the following source:

Presbyterian Board of Mission for Freedmen Friends North and South.

Tuition of students.

That the income of the school for the fiscal year ending June, 1897, was $3,500, of which amount the sum of about $1,100, board; tuition, about $700, was derived from tuition fees, and the balance from the source above enumerated.

There is an attendance upon the school this session pupils who formerly attended the Ware high school, among which are the children of Albert S. Blodgett, Jerry M. Griffin, J. W. Cumming.

Deponent makes this affidavit because she has been subpœnaed as a witness to attend the court, and to avoid attendant upon the court pursuant thereto. She wants it to appear that she is not a volunteer in giving the information herein set worth.

LUCY C. LANEY.

Sworn to and subscribed before me this 11th day of October, 1897.
WM. J. WHITE,
Not. Pub., R. C., Ga.

49 STATE OF GEORGIA, }
Richmond County. }

Personally appeared Lawton B. Evans, who, being duly sworn, says that he is the county school commissioner of the county aforesaid; that he has read the affidavit of W. J. White, dated the 16th day of November, 1897, referring to public education in Richmond county. Deponent in reply says that he has been the county school commissioner since 1882, and that since that time said White has not been a regular attendant of the sessions of the board for many months. Deponent says that he has had occasional conferences with said White, and that about six years ago there were in the neighborhood of 600 negro children for whom the trustees of the city schools had not made provision, an application for which was

made to the board, and that in pursuance thereof the First Ward Grammar School building was erected to meet this want, whereby provision was made to accommodate 400 additional pupils, raising the attendance from 250 to 650.

That, in so far as the said affidavit refers to the Payne, Walker, and Haines Institutes, deponent says that each of these institutions have been established since he became the county commissioner and since the Ware high school was established; that while these institutions are under denominational control, there is no denominational teaching enforced in these schools; that they are open to everybody, irrespective of denomination, and that the impression sought to be conveyed by the said affidavit to the contrary is untrue.

LAWTON B. EVANS.

Sworn to and subscribed before me Nov. 2, 1897.

H. H. ALEXANDER,
Notary Public, Richmond Co., Ga.

50 STATE OF GEORGIA, }
Richmond County. }

Personally appeared Charles S. Bohler, who, being duly sworn, says he is tax collector of said county.

That he has examined the tax digest of the county of Richmond for the year 1897; that the name of J. W. Cumming appears thereon as a tax-payer on property to the amount of $2,080; that the education tax imposed by the board of education of Richmond county on this amount is $4.58.

That there also appears on said digest of 1897 the name of James S. Harper as a tax-payer on property to the amount of $2,550; that the educational tax imposed by the board of education of Richmond county on this amount is $5.61.

That there also appears on the said digest of 1897 the name of John C. Ladeveze as a tax-payer on property to the amount of $5,900; that the educational tax imposed by the board of education of Richmond county on this amount is $12.98.

CHAS. S. BOHLER.

Sworn to and subscribed before me Oct. 11, 1897.

WM. E. KEENER,
Clerk S. C., R. C., Ga.

51 *Minutes of the Board of Education of August 28th, 1897, Showing the Presence of Twenty-seven Commissioners.*

The president announced that the meeting had been called at the instance of several members of the board of education for the purpose of considering the petition of the colored citizens relative to the Ware high school. The secretary was directed to notify the petitioners that the board was ready to hear them. The committee came in and John C. Ladeveze read the following petition:

"We, the undersigned, citizens of Augusta and patrons of the Ware high school, most respectfully petition your honorable body to reconsider your action in abolishing the Ware high school for the following reasons, to wit:

"This school has been in operation for a number of years, and is now in a more prosperous condition than at any time since its establishment, and is being conducted satisfactorily to the board of education and its patrons.

"While we deplore the inability of the board to provide schools for all the children, yet we feel that it is more important to continue the Ware high school for the higher education of our children who have passed through the grammar schools than to abolish the said high school and establish primary schools, and, inasmuch as the board will receive an additional amount this year from increased taxation, we hope that you will see your way clear to establish the four primary schools as contemplated.

"We most respectfully call your attention to section 9, an act to regulate public instruction in Richmond county, which reads as follows: 'That the county board of education under the advice and assistance of the trustees in each ward of school district shall make all the necessary arrangements for the instruction of the white and colored youths in separate schools. They shall provide the same for each, both as regards school-houses, fixtures, attainments, and abilities of teachers, length of term time, and all other matters pertaining to education.'

"We most earnestly ask that you continue the Ware high school.

"And your petitioners will ever pray."

Signed by himself and others.

52 W. J. White read an address to the board supporting the petition. Maj. Ganahl spoke in answer to the petition and the address. Mr. M. M. Conner spoke in favor of granting the petition for the Ware high school, and a motion was made by him to rescind the action of the board and to re-establish the Ware high school. Discussion ensued and a vote was taken, resulting as follows: 23 nays, 3 ayes, 2 not voting. The chair declared the motion was lost and the petition refused. The board then adjourned.

53 *Tax Levy*, 1897.

Passed July 10th, 1897.

Resolved by the county board of education (two-thirds concurring therein), That a tax is hereby levied for school purposes for the year 1897 of forty-five thousand ($45,000) dollars on the taxable property of said county held by the legal tax-payers therein, and Charles S. Bohler, tax collector of said county, or his successors in office, is hereby required and directed to collect said tax.

I, Lawton B. Evans, sec't'y county board of education of Richmond county, Georgia, do hereby certify that the above-stated sev-

eral matters are full, true, and complete copies from the record book of the official proceedings of said board of said matters.

Witness my hand and seal this 20th day of Sept., 1897.

[L. S.] LAWTON B. EVANS,
Sec'ty B'd Educ.

54 J. W. CUMMING ET AL. *vs.* COUNTY BOARD OF EDUCATION OF Richmond County *et al.* } Petition for Injunction, &c., in Richmond Superior Court.

The rule to show cause in the above-stated case was made returnable October 4th, 1897, and was regularly continued from time to time, to suit the convenience of counsel, until November 24th, 1897, when the cause came on to be heard upon the amended petition of plaintiffs, the demurrer and answer of the defendant Charles S. Bohler, tax collector of Richmond county, and the amended demurrer and answer of the defendant The Board of Education of Richmond County. After hearing evidence and argument, the court reserved its decision.

After careful consideration of the pleadings and evidence and the law applicable to the issues raised, I have reached the following conclusions:

The act of 1872 creating the board of education of Richmond county vested in that board large discretionary powers, and the exercise of these discretionary powers *are* in most instances not subject to control, revision, or alteration by any court or by any other governmental agency. The board justly claims to be a subordinate branch of the government, possessed of legislative, judicial, and executive functions, and one of its strongest elements of usefulness is the power which it has to exercise its discretion, uncontrolled, in the management of the schools and educational interests of Richmond county; but, as large as its powers may be and as broad as the discretion which it possesses may be, it has no powers, discretion, or authority save those given by the act of the legislature creating the board and the acts amendatory thereof, and every exercise of discretion or power by the board, whether it be characterized as legislative, judicial, or executive, must be exercised within the limits of the authority delegated by the legislature.

I think a proper construction of the 9th and 10th sections of the act of 1872 will settle and control the main question raised in this case. Section 9 reads as follows:

55 "That the county board of education may establish schools of higher grade, at such points in the county as the interests and convenience of the people may require, which schools shall be under the special management of the board at large, who shall have fully power, in respect to such schools, to employ pay and dismiss teachers, to build, repair and furnish the school house or houses, purchase or lease sites therefor, or rent suitable rooms, and make all other necessary provisions relative to such schools as they may deem proper; the funds for such purpose shall be deducted ratably from the quota apportioned to the respective school districts."

It is contended by the board of education that the provisions and requirements of section 9, above quoted, apply only to the common schools of the county, which they are authorized to establish under the preceeding sections of the act, and that they have no application to the high schools which they are authorized to establish in section 10. I think the provisions and requirements of section 9 apply with equal force to all the schools established by the board under this act, whether they be common schools or high schools. The section does not expressly nor by implication confine its provisions to district or common schools, but is to my mind expressly applicable to every school established under the act in Richmond county. The fact that it precedes instead of following section 10, which authorizes the establishment of high schools, does not exclude its provisions and requirements from such high schools if they are established. Any other construction of section 9 would render the act inconsistent. For instance, this is the only section of the act which requires that white and colored children shall be taught in separate schools. It would not be contended that this requirement would be binding on the board in common schools, but not binding on them in such high schools as they might establish. Again, why should the legislature require equal facilities for white and colored children in common schools and not in high schools? But the language of the section is not ambiguous. It says, "They shall provide the same facilities for each," and after enumerating teachers, school houses, &c., concludes with this comprehensive clause, "and all other matters appertaining to education." With this construction placed upon the act of 1872, it is not violative of the
56 provisions of the constitution of 1868 nor of the 14th amendment to the Constitution of the United States; but if the construction contended for by the defendants is placed upon the act it would, in my opinion, be repugnant to both.

Therefore I have concluded that the establishment and maintenance of schools of higher grade than common schools, authorized by section 10 of the act, is a matter that rests exclusively in the sound discretion of the board, but if the discretion is exercised in the establishment or maintenance of schools of higher grade they must be established and maintained in harmony and in compliance with section 9 of said act, and the board must provide the same facilities for higher education for both races. I do not mean to say that they must provide the same number of high schools for one as for the other, because the necessities of each race, which would determine that question, might be very different, and I would be invading the province of the discretion vested in the board to attempt to determine that question.

It appears from the evidence in this case that there are colored children between the ages of six and eighteen of high-school grade in Richmond county; and it further appears that the board has discontinued the Ware high school, which was the only colored high school maintained by the board in said county; and it also appears that the board is now maintaining by contributing to the support of two high schools in said county for white children.

The colored children of high-school grade in Richmond county are, under the act in question, entitled to the same facilities for high-school education as are being provided by the board for the white children of the county. It is no answer to this proposition to say that there are in Richmond county three high schools for the education of colored children supported by private enterprise, independent of the board of education, nor does it matter how ample their facilities may be for providing higher education to the colored children of the county, nor whether they are sectarian or secular. These schools are entirely independent of the board of education and of the system of schools established by the act under consideration. While the existence of these private schools for colored children may have considerable influence in lessening the number of colored children of high-school grade that the board will be called upon to provide with the same facilities for high-school education as are furnished the white children, their
57 existence does not diminish the right of colored citizens and tax-payers who have children of high-school grade that are not attending these private schools and who demand a school established by the board, managed under its supervision and supported by the funds raised by public taxation.

Whether the two high schools for white children in Richmond county, which are now supported by the board of education, constitute a system of high schools for white children, as charged, or whether they were established by the board under section 10 of said act, is immaterial in this case. Schools receive large contributions from the public-school fund of the county in the hands of the board, they are under the management and control of the board, and the contributions are made to these schools as high schools for white children. This action of the board is, in my opinion, illegal and violative of the provisions of their organic act, unless they provide equal facilities for the colored children in the county of high-school grade who are asking for such school privileges, the evidence in this case showing that there are a sufficient number of such colored children in the county to make their request reasonable.

I have not undertaken to determine the question raised by the 2nd paragraph of the amendment to plaintiff's petition as to the right of the board to charge tuition in high schools to children resident in Richmond county for two reasons: First, because I do not think the question is sufficiently raised by the pleadings; and, second, because counsel for plaintiff, in his argument, stated that he did not desire the court to consider this question otherwise than in its bearing upon the right of colored children to have equal high-school facilities with white children.

I do not think it would be a wise, if a legal, exercise of the powers of a court of equity to interfere with or to restrain the tax collector of the county from collecting any part of the taxes levied and assessed by the board of education for school purposes. These taxes were not levied separately for common and high-school purposes, but are being collected under one levy for educational purposes.

58 Therefore the demurrer filed by the defendant Charles S. Bohler, tax collector, is sustained, and the first prayer of plaintiff's petition is refused.

But the demurrer filed by the defendant board of education is overruled and the second prayer of plaintiff's petition is granted, and the Board of Education of Richmond County is hereby restrained and enjoined from using any funds or property now in or hereafter coming into its hands for educational purposes in said county for the support, maintenance, or operation of any white high school in said county until said board shall provide or establish equal facilities in high-school education as are now maintained by them for white children for such colored children of high-school grade in said county as may desire a high-school education or until the further order of the court.

This December 2d, 1897.

E. H. CALLAWAY,
J. S. C., A. C.

Filed in office Dec. 22, '97.

WM. E. KEENER, *Clerk.*

59 J. W. CUMMING ET AL.
vs.
THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY *et al.*
} Petition in Equity. Injunction.

Pursuant to the law which authorizes the judge, upon rendering a decision, to make such order as may be necessary to preserve and protect the rights of the parties until the judgment of the supreme court can be had thereon:

It is hereby ordered that the decision of this day in the above-stated case granting injunction be suspended until a decision by the supreme court shall be rendered upon the bill of exceptions about to be sued out by the defendant to the said decision and to the making of the rule to show cause absolute.

December 22d, 1897.

E. H. CALLAWAY,
J. S. C., A. C.

Filed in office Dec. 22, '97.

WM. E. KEENER, *Clerk.*

60 Richmond Superior Court, October Term, 1897.

J. W. CUMMING ET AL.
vs.
THE BOARD OF EDUCATION OF RICHMOND COUNTY *et al.*
} Injunction.

The remittitur from the supr-me court, dated March 26th, 1898, being presented to the court reversing the judgment of the court because the court erred in granting an injunction, it is ordered:

1. That the same be entered on the minutes of this court and the

judgment of the court excepted to be *be* reversed on the ground stated.

2. That the plaintiff- in the case be, and they are hereby, refused all the relief prayed for and the petition dismissed at their costs.

3. That the Board of Education of Richmond County recover of the plaintiffs, J. W. Cumming, James S. Harper, and John C. Ladeveze, thirty-nine and fifty one-hundred- dollars ($39.50) costs paid for the transcript of the record to the supreme court and costs in the court, and that execution issue therefor in favor of the Board of Education of Richmond County and also for — dollars costs in this court.

April 18, 1898.

E. H. CALLAWAY,
J. S. C., A. C.

Supreme Court of the State of Georgia.

ATLANTA, GA., *March* 23*rd*, 1898.

The honorable supreme court met pursuant to adjournment. The following judgment was rendered:

BOARD OF EDUCATION OF RICHMOND COUNTY
vs.
J. W. CUMMING ET AL.

This case *case* came before this court upon a writ of error from the superior court of Richmond county, and after argument had it is considered and adjudged that the judgment of the court below be reversed because the court erred in granting an injunction, all the justices concurring.

Bill of costs, $10.00.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *March* 26, 1898.

I certify that the above is a true extract from the minutes
61 of the supreme court of Georgia, and that Frank H. Miller paid the above bill of cost.

Witness my signature and the seal of said court, affixed the day and year last above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

62 Know all men by these presents that we, J. W. Cumming, James S. Harper, and John C. Ladeveze, as principals, and L. McKelvie and Americus Berry, as sureties, are held and firmly bound unto the County Board of Education of Richmond County, State of Georgia, in the full and just sum of five hundred dollars, to be paid to the said The County Board of Education of Richmond County, State of Georgia, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a superior court of Richmond county, State of Georgia, in a suit depending in said court between J. W. Cumming, James S. Harper, and John C. Ladeveze, complainants, and The County Board of Education of Richmond County, State of Georgia, defendant, a decree was rendered against the said complainants, and the said complainants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said complainants shall prosecute said writ to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. W. CUMMING. [SEAL.]
JAMES S. HARPER. [SEAL.]
JOHN C. LADEVEZE. [SEAL.]
L. McKELVIE. [SEAL.]
AMERICUS BERRY. [SEAL.]

Sealed and delivered in presence of—
H. P. SHEWMAKE,
[NOTARY SEAL.] *Not. Pub., Rich. Co., Ga.*

I certify that in my opinion the signers of this bond are responsible for the amount thereof.

EMORY SPEER, *U. S. Judge.*

63 Approved by—
E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

Washington, D. C., Nov. 25*th*, 1898.

Filed in the office of the clerk of the superior court of Richmond county, Georgia, this 28th day of November, 1898.

WM. E. KEENER,
Clerk Superior Court, Richmond County, Georgia.

64 *Assignment of Errors.*

The complainants aforesaid assign for error:

First. That the statute of the State of Georgia giving a discretion to the said county board of education to establish and maintain high schools for white persons, and to discontinue and refuse to maintain high schools for persons of the negro race, was and is contrary to the Constitution of the United States, and especially to the 14th amendment thereof.

Second. That the said court decided and held that the Constitution of the United States was not violated by the action of the said board in establishing and maintaining high schools for the education of white persons and in refusing to establish and maintain high schools for the education of persons of the negro race.

Third. In deciding and holding that persons of the negro race could, consistently with the Constitution of the United States, be by the laws of Georgia taxed, and the money derived from their taxation be appropriated to the establishment and maintenance of high schools for white persons, while pursuant to the same law the said board, at the same time, refused to establish and maintain high schools for the education of persons of the negro race.

65 Fourth. That the said court erred in dismissing the complaint of the plaintiff in error.

GEO. F. EDMUNDS,
Attorney & Counsel for Plaintiffs in Error.

66 [Endorsed:] Cumming *et al. v.* County Board of Education. Errors. Oct. 17, '98. Filed in the office of the clerk of the superior court of Richmond county, Georgia, this 28th day of November, 1898. Wm. E. Keener, clerk superior court, Richmond county, Georgia.

67 UNITED STATES OF AMERICA, *ss:*

To the County Board of Education of Richmond County, State of Georgia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the superior court of Richmond county, State of Georgia, wherein J. W. Cumming, James S. Harper, and John C. Ladeveze are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this eighth day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

68 On this twenty-ninth day of November, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Edward E. Pritchard before me, the subscriber, clerk of the superior court of Richmond county, State of Georgia, and makes oath that he delivered a true copy of the within citation to William C. Jones, president of the county board of education of Richmond county, State of Georgia, and that deponent is deputy sheriff

of said county, and that the sheriff of said county is incapacitated from illness from making said service of said citation.

EDWARD E. PRITCHARD.

Sworn to and subscribed the 29th day of November, A. D. 1898, before me, the subscriber aforesaid.

In witness whereof I have hereunto set my official signature and the seal of said superior court.

WM E. KEENER,
Clerk Superior Court, Richmond County, Georgia.

[Endorsed:] Filed in the office of the clerk of the superior court of Richmond county, Georgia, this 29th day of November, 1898. Wm. E. Keener, clerk superior court of Richmond county, Georgia.

69 STATE OF GEORGIA, }
Richmond County. }

1. Be it remembered that on the 21st day of September, 1897, J. W. Cumming, James S. Harper, and John C. Ladeveze filed their petition in equity against the board of education of Richmond county and Charles S. Bohler, as tax collector of said county, alleging that the county board of education had abolished a high school of the county known as the Ware high school, established for the colored school population, had levied a tax July 10th, 1897, one-tenth of which was for the support of high schools, and the collector was proceeding to collect it.

2. The petition prayed that the collector be enjoined from collecting so much of the tax levy for the year 1897 as had been levied for the support by said board in said county of the system of high schools; that the board be enjoined from using any funds or property now in or hereafter coming into its hands for educational purposes in said county for the support, maintenance, or operation of the system of high schools.

3. Upon the presentation of this petition, verified by the petitioners, a rule to show cause was issued why the relief in the petition should not be granted. Cause was shown by the defendant by demurrers and answers, copies of which will appear in the transcript of the record, and is herein referred to for full information.

4. Thereafter, on November 24th, 1897, the case came on to be heard before the Hon. Enoch H. Callaway, judge of the superior courts of the Augusta circuit, then and there presiding, when the
70 pleadings were read and affidavits and other evidence were submitted by the petitioners and the defendants, an abstract of which is hereto attached, marked Exhibit "A," as a part hereof.

5. Pending the hearing the plaintiffs moved to amend their petition; to which the defendants objected because the amendment was not verified, set out a separate and independent cause of action, prayed for relief, conflicting with the relief prayed for in the original petition; in paragraph two it made an averment without stating the ground of illegality, and in paragraph three charged

illegality without stating the action complained of to make it such, a copy of which will appear in the transcript of the record.

6. All of these objections the court overruled, and then and there, without being verified, allowed the amendment to be filed, a copy of which will appear in the transcript of the record, to which reference is made as if set out herein.

7. Argument was then had, when, at its conclusion, decision was reserved by the court until December 22nd, 1897, when the demurrer filed by the defendant Charles S. Bohler, tax collector, was sustained, and the first prayer of the plaintiff's petition refused; but the demurrer filed by the defendant The Board of Education was overruled, and the second prayer of plaintiff's petition granted; to which decision, a copy of which will appear in the transcript of the record, reference is made as if inserted and fully set out herein.

8. And now, within twenty days from the rendition of said judgment, comes The Board of Education of Richmond County, by its solicitors, and, desiring to have the same reviewed in conformity to law, excepts to the same and assigns error on the following grounds:

9. Because the court, under the petition as amended, was without jurisdiction to grant the relief prayed for in paragraph two
71 of the prayers of said petition, and erred in allowing the amendment to be filed.

10. Because the court overruled the demurrer to the bill as so amended.

11. Because the court, having allowed the plaintiff to file an amendment in which it denied the legal right of the board to charge for extending a public high-school education to the children of school age of actual residence of the county, and which amendment reaffirmed, without qualification, the averments of the original petition, failed to adjudicate and determine the questions raised by this amendment, assigning as one of his reasons therefor that counsel for plaintiff, in his argument, stated that he did not desire the court to consider this question otherwise than in its bearing upon the right of colored children to have equal high-school facilities with white children, no amendment of the pleadings to this effect having been made, and it being no such statement "*in judicio*" as would justify the court in failing to determine all questions at issue after allowing the amendment.

12. Because the court allowed petitioners to file at the hearing under the orders previously passed in the cause and to be found in the record, over the objections of the defendants, an amendment to the pleadings not verified, and failed to determine, in rendering his decision, the truth of the averment therein that the board had no legal right to charge for extending public high-school education to the children of school age of actual residence in the county.

13. Because the court, having by its *ad interim* decree sustained the demurrer of the tax collector and held the tax legal and refused to interfere with its collection, thereby exhausted its interlocutory jurisdiction and could not legally, under the pleadings in this case,

exercise visitorial power over the defendant, and particularly
72 before the final decree; nor could the judge set aside the solemn judgment of defendant finally rendered upon the written application of petitioners made to it at its meeting of August 28th, 1897, the board of education respectfully insisting that under the act of 1872 and amendments it is a body vested with full authority to determine all such questions as the establishment of schools, and that the decision then rendered cannot be reviewed by petitioners in this proceeding; that the decision now complained of by the board is in effect government by injunction, with legislation by the court.

14. Because the court failed to determine the questions at issue as to the legality or illegality of schools of higher grade now existing or in existence at the date of the adoption of the constitution, of 1877, but enjoined the board from using any funds or property now in hand or thereafter coming into its hands for continuing the operation of any white high school in the county until the board shall have provided or established equal facilities in high-school education as are now maintained by them for white children for such colored children of high-school grade in said county as may be desired by the colored school population of said county.

15. Because the court held that section nine of the "Act to regulate public instruction in the county of Richmond," approved August 23rd, 1872 (P. L., 460), which required the making of all necessary arrangements for instruction of the white and colored youth in separate schools, and required them to provide the same facilities for each, applied to and governed the board of education in the establishment of schools of higher grade authorized to be done by section ten of the said act, the error being that under section nine the county board were to act under the advice and assistance of the trustees in each ward or school district, and that in section ten the enactment was that the county board may establish
schools of higher grade, which schools should be under the
73 special management of the board at large who may make all necessary provisions incident to said schools as they may deem proper, and that this discretion vested under section ten was controlled by section nine, under which the board was imperatively required to act, but not so under section ten, which left it entirely discretionary.

16. Because the court, in considering the powers of the board of education of Richmond county, and having before him for consideration sections nine and ten of the act of August 23, 1872 (P. L., 460) to regulate public instruction in the county of Richmond, held hat the fact that section nine preceded instead of following section ten does not exclude its provisions and requirements from such high schools if they are established, the court overlooking the fact that after the passage of the act section ten was amended by the act of February 22nd, 1877 (P. L., 347), when there was added to it additional authority to charge tuition and incidental expenses in such schools of higher grade as the board from time to time may fix and determine, and the further provision contained in section

20 of the said act, that no general law on the subject of education then in force in the State or thereafter to be enacted by its General Assembly shall be so construed as to interfere with, diminish, or supercede the rights, powers, and privileges conferred upon the board of education of Richmond county by this act, unless it shall be so expressly provided by designating the said county and board under their respective names.

17. Because the court in the rendering of his decision limited it to an overruling of the demurrer of the board of education and did not pass upon the cause shown in the answer, which specifically asserted that the Ware high school had not been abolished, but suspended until the board was in funds and had applied the building formerly used for the high school and the funds set apart for its support to the education in primary schools of the colored
74 race, as an imperative requirement on them under section nine of the said act.

18. Because the court, having sustained the demurrer of the tax collector that the plaintiffs had made no case as would authorize judicial interference by injunction with the system of taxation provided for under the act of August 23rd, 1872, proceeded further to enjoin the application by the board of the tax so collected by it as to all schools of higher grade, it appearing that at the adoption of the constitution of 1877 the white schools now being supported were of the same character as those in existence at the adoption of the constitution of 1877, which, in art. 8, section 5, ordains that existing local school systems shall not be effected by this constitution.

19. Because the injunction, as granted by the court, was too broad and unlimited:

(*a.*) It was in effect a revision by certiorari of the decision of the board upon a question entirely committed to its discretion, and a revocation and overruling of the discretion so exercised upon matters brought to the attention of the board by petition of the same plaintiffs and decided adversely to them.

(*b.*) The injunction was not confined to the tax on petitioners' property, but it was extended to the tax assessed upon all other tax-payers, none of whom joined in the petition, and there being no evidence that petitioners were a class, or by their action represented a class.

(*c.*) It was made to apply in favor of all who desired a high-school education without limit, or definite as to the time when it was to become operative, when the evidence was clear and uncontroverted that with the obligations now assumed by the board for the maintenance of the primary schools established in the building formerly used as the Ware high school the board was without funds to carry on the said Ware high school under the levy for 1897.

75 20. Because the court, having found that the authority of the board as set forth in section ten was limited in every particular to the requirements of section nine, if white schools were established and supported by it, and that this construction placed upon the act was not violative of the provisions of the constitution of 1868 nor of the fourteenth amendment of the Constitution of the

United States, further found that if the construction contended for by the defendants be placed upon the act it would, in his opinion, be repugnant to both, the error of the court being:

(*a.*) That the act of 1872 and this mode of taxation thereunder had been expressly adjudicated to be constitutional by the supreme court of Georgia.

(*b.*) Because the true action of the board had by it, as set forth in the answer, was not in violation of the fourteenth amendment of the Constitution of the United States.

(*c.*) Because the action of the board in temporarily suspending the Ware high school, for the reason that the wants of the public do not demand its present continuance, is not in violation of the act of 1872 and its amendments, nor violative of the fourteenth amendment of the Constitution of the United States, nor did this board thereby deny equal protection of the laws to any person within the jurisdiction of the State.

21. And the board of education of Richmond county hereby specify as the portions of the record to be certified and sent up:

1st. Original petition, filed September 21st, 1897, with the rule to show cause and return of service thereon.

2nd. Demurrer and answer of the board of education of Richmond county, filed October 9th, 1897.

3rd. Several orders of the court adjourning the hearings and prescribing the filing by plaintiffs of papers relied upon outside
76 of the record.

4th. Demurrer and answer of Charles S. Bohler, tax collector of Richmond county.

5th. Amendment to plaintiffs' petition.

6th. Amended demurrer and answer of board of education.

7th. Decision of the court, dated December 22nd, 1897.

GANAHL & GANAHL,
FRANK H. MILLER,
W. K. MILLER,
Solicitors for the Board of Education of R. County.

77 EXHIBIT "A."

Evidence for Petitioners.

1. Affidavits of J. W. Cumming, James S. Harper, and John C. Ladeveze:

That they are the fathers of unmarried colored children between the ages of sixteen and seventeen who were attending the Ware high school, in said county, when the school was abolished, and are now waiting to enter the said children in a high school when it shall be furnished by the board of education to the colored race; that no facilities for high-school education have been furnished them by the said board since the said Ware high school was discontinued by the board.

2. Affidavits of Albert S. Blodgett, Jerry M. Griffin, petitioners in the mandamus case, to the same effect.

3. Affidavit of W. J. White:

That he has for seventeen years past been the editor of a weekly newspaper in the city of Augusta, and for years past colored children have been annually denied admittance to the public schools on the alleged grounds of deficiency of means for their education; that he is well acquainted with the three private colored schools in the city, the Payne, the Walker, and the Haines Institutes, which are all pay schools, under denominational control, and have no connection with the public-school system of the county; that owing to the fact that there is an opening for employment for many small white boys in the stores and other places of business in the city as cash boys, errand boys, etc., and as there is also a large opening for employment in the cotton factories of the city, more particularly in the Fourth and Fifth wards of the city, where half of the entire white school population is located, and as the parents of such children largely put them to work, there is not the same earnest call for education for white children as there
78 would otherwise be, but, as the smaller colored children have no opening for employment accessible, there is a great pressure on the part of their parents to get them into the public schools, an eagerness of long standing and frequently noted in the reports of said board.

4. Affidavit of L. B. Evans:

To interrogatory propounded, that he is the secretary of the board of education and has been since 1882; that he has been notified that $32,096.79 is the quota coming to the board from the State educational — for the current school year.

5. In response to a notice to produce report of superintendent of public schools, dated July 10th, 1880:

That he again feels compelled by a sense of duty to recommend the establishment of a high-school class for colored pupils. The law expressly says that while the white and colored schools shall be separate the facilities shall be the same. The school ought to be given or the law ought to be repealed. To grant today the petition of the colored people would be only an act of tardy justice.

6. Report of the committee on the establishment of colored high schools, dated October 9th, 1880, acting upon the petition of White and others, setting forth that there were forty-five colored children in the county prepared to enter it and to pay therefor the sum of ten dollars per scholastic year. It is stated it would require but a small amount of money to be added to the sum to be derived from this source to establish a high school for male and female colored children, and thus carry out the letter and spirit of our organic act. They recommended that a high school be immediately established. Upon the presentation of this report it was adopted.

7. Action of the board of June 12th, 1897: The following resolution by Maj. Ganahl, seconded by Jas. L. Fleming:

Resolved, That a committee of five, together with the president and secretary of the board, be appointed by the president,
79 whose duty it shall be to investigate the status of the high schools and their relation to the board of education, with

power to call for information upon the school trustees and the principals and teachers of the school, said committee to report to the July meeting of the board and make such recommendation as in its judgment may be proper and necessary.

The committee filed a report July 10th, 1897, recommending "that the high school for negro children, known as the Ware high school, be discontinued by this board. This is not to be considered as a reflection upon the ability or faithfulness of the teachers or the character of the work done by them, but is for purely economic reasons in the education of the negro race; that the city conference board be requested to open four primary schools in the same building at a cost of about $200 apiece for the education of those negro children who are annually denied admittance to the schools." Signed by the committee of seven. Vote was taken on the report, and it was adopted. Mr. Fisher moved that the board of education reinstate the Ware high school whenever the board could, in their judgment, afford it. This motion was carried.

8. Portions of the printed report of the board for 1896 and 1897:

Report of the Secretary.

"It is needless to say again that the negroes everywhere crowd into the schools." * * * "The eagerness of this race for school privileges is remarkable and commendable."

Report of the Finance Committee.

Expenditures.

Salaries, high schools	(white)	$6,549.61
" " "	(colored)	1,057.50
" city "	(white)	56,222.05
" " "	(colored)	7,131.40
80 Salaries, country schools	(white)	11,521.90
" " "	(colored)	6,092.08

By-laws of the Board of Education.

SECTION 3. Requiring the appointment of seven committees, namely: On finance, high schools, rules and regulations, text books, examination of teachers, and sanitary affairs, consisting of five members each.

SECTION 8. At the regular monthly meeting in July the board shall elect high-school teachers for the ensuing scholastic year.

Rules and Regulations for the Government of the Public Schools. Organization.

SECTION 1. The schools shall be divided into primary, intermediate, grammar, and high-school grades.

SECTION 8. Examinations shall be regularly held in all the schools at the close of each term. These examinations may be oral or written, or both combined, at the discretion of the commissioner; but

the final examination at the close of the scholastic year must be at least partly written in high schools and the last year of the grammar schools.

SECTION 12. The text books and course of study pursued in all the schools shall be such only as are prescribed by the board.

As to the County School Commissioner.

SECTION 8. He shall certify to the high school accounts in the same manner as the trustees of the wards and districts certify to claims and accounts against the schools in their respective jurisdiction.

Pupils.

SECTION 18. Non-resident children may be admitted to the schools on the payment of tuition in advance each term, and provided there is room, so that they do not prevent the admission of resident pupils.

81 SECTION 19. All resident pupils applying for admission into the high schools shall pay in advance the sum of $7.50 per term for white schools and $5.00 for colored schools.

SECTION 20. All pupils upon completing the full high-school course shall receive certificates or diplomas, the form of which shall be prescribed by the board of education.

General Information Concerning the System.

The schools in each district and village in the country are under the entire control of the local trustees. The teachers are chosen by them. The teachers in the high schools are chosen by the entire board of education. A certificate of the first grade entitles a teacher to teach in the primary schools only; of the second grade to teach in the intermediate schools, and of the third grade to teach in the grammar and high schools. There are no expenses connected with the schools except that of janitor's fees, which amount to about 75 cents a year for each pupil.

For the Defendants.

9. Affidavit of George A. Goodwin:

That as principal of the Walker Baptist Institute, in the county of Richmond, he conducts an academic department of equal grade with the curriculum of the Ware high school, open to all colored children of both sexes, and has accommodations for many more pupils. Each pupil is charged $8 per annum. School-house is a commodious building well fitted up. Revenue of the school for fiscal year was twenty-five hundred and ninety-eight dollars ($2,598.00).

10. Affidavit of George Williams Walker:

That he is the principal of the Payne Institute, a school in the city of Augusta, which conducts an academic and collegiate dapart-

ment; that the curriculum of the academic department is of equal grade with that of the Ware high school, and the curriculum of the collegiate department is higher. The school is open to
82 all colored children of either sex; has in process of erection a building which will furnish ample accommodations for a greater number of pupils than have ever applied; tuition of $8 per annum; no expense beyond except for books; school been opened since 1884; is supported by donations through M. E. Church (South), and colored M. E. church; income for last year, $7,344.48, of which sum $203.25 was derived from tuition fees.

11. Affidavit of Lucy C. Laney:

That as principal of Haines' industrial school, in the city of Augusta, she conducts an academic department for higher school education, curriculum of equal grade of Ware high school, and open to colored children of both sexes at $8 per annum; income derived from Presbyterian board of missions for freedmen and friends, etc.; income present year, $3,500.00. There *is* in attendance pupils who went to Ware high school, among them the children of Albert S. Blodgett, Jerry M. Griffin, and J. W. Cumming.

12. Affidavit of Lawton B. Evans:

That about six years ago there were in the neighborhood of six hundred children of the negro race for whom the trustees had not made provision, application for which was made to the board; that in pursuance thereof the First ward grammar-school building was erected to meet this want, whereby accommodations were made for four hundred additional pupils, raising the attendance from two hundred and fifty to six hundred and fifty; that the Payne, Walker, and Haines Institutes are not denominational schools; they are open to everybody, irrespective of denomination.

15. Affidavit of Charles S. Bohler, tax collector:

That the entire amount of educational tax imposed by the board of education upon the property of J. W. Cumming is $4.58; upon James S. Harper, $5.61, and upon John C. Ladeveze, $12 98; upon the property of Albert S. Blodgett was 44 cents, no tax return being made by Jerry M. Griffin.

14. Minutes of the board of education of August 28th, 1897,
83 showing the presence of twenty-seven commissioners:

The president announced that the meeting had been called at the instance of several members of the board of education for the purpose of considering the petition of the colored citizens relative to the Ware high school. The secretary was directed to notify the petitioners that the board was ready to hear them. The committee came in, and John C. Ladeveze read the following petition:

"We, the undersigned, citizens of Augusta and patrons of the Ware high school, most respectfully petition your honorable body to reconsider your action in abolishing the Ware high school for the following reasons, to wit:

"This school has been in operation for a number of years and is now in a more prosperous condition than at any time since its establishment, and is being conducted satisfactorily to the board of education and its patrons.

"While we deplore the inability of the board to provide schools for all the children, yet we feel that it is more important to continue the Ware high school for the higher education of our children who have passed through our grammar schools than to abolish the said high school and establish primary schools; and inasmuch as the board will receive an additional amount this year from increased taxation, we hope that you will see your way clear to establish the four primary schools as contemplated.

"We most respectfully call your attention to section 9, an act to regulate public instruction in Richmond county, which reads as follows: 'That the county board of education under the advice and assistance of the trustees in each ward or school district, shall make all the necessary arrangements for the instruction of the white and colored youths in separate schools. They shall provide the same for each, both as regards school-houses, fixtures, attainments
84 and abilities of teachers, length of term time, and all other matters pertaining to education.'

"We most earnestly ask that you continue the Ware high school.

"And your petitioners will ever pray."

Signed by himself and others.

W. J. White read an address to the board supporting the petition. Maj. Ganahl spoke in answer to the petition and the address. Mr. M. M. Conner spoke in favor of granting the petition for the Ware high school, and a motion was made by him to rescind the action of the board and to re-establish the Ware high school. Discussion ensued, and a vote was taken, resulting as follows: 23 nays, 3 ayes, 2 not voting. The chair declared the motion was lost and the petition refused. The board then adjourned.

15. Rebuttal for petitioners.

Affidavit of George W. Walker.

That he is the principal of the Payne Institute. Said institute is a Methodist school, supported by the Methodist Episcopal Church, South, and the Colored Methodist Episcopal Church in America; that it has no connection with the public-school system of Richmond county and receives no support from said school system.

The foregoing brief approved.
Dec. 30, 1897.

E. H. CALLAWAY,
Judge Superior Court, Augusta Circuit.

85 STATE OF GEORGIA, }
Richmond County. }

I do certify that the foregoing bill of exceptions is true and contains all of the evidence and specifies all of the record material to a clear understanding of the errors complained of, and the clerk of the superior court of Richmond county is hereby ordered to make out a complete copy of such parts of the record in said case as are in

this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the October term, 1897, of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

December 30th, 1897.

E. H. CALLAWAY,
J. S. C., A. C.

STATE OF GEORGIA,
Richmond County.

I, J. B. Keener, d'p'ty clerk of the superior court of Richmond county, hereby certify that the above and foregoing is the true original bill of exceptions in the case therein stated just as received by me from the judge of the Augusta circuit, and filed in the clerk's office of the said court, and is now transmitted to the supreme court of the State of Georgia pursuant to the order of the said judge.

Witness my official signature and the seal of said court this 30 December, 1897.

J. B. KEENER, *D. C.*

86 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *November*, 1, 1898.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the original bill of exceptions in the case of Board of Education of Richmond County *et al. v.* J. W. Cumming *et al.*, as appears from the original now of file in this office.

Witness my signature and the seal of said court hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

[Two-cent U. S. internal-revenue stamp, canceled 2, 10, '98, Z. D. H.]
[Two-cent U. S. internal-revenue stamp, canceled 2, 10, '98, Z. D. H.]
[Two-cent U. S. internal-revenue stamp, canceled 2, 10, '98, Z. D. H.]
[Two-cent U. S. internal-revenue stamp, canceled 2, 10, '98, Z. D. H.]
[Two-cent U. S. internal-revenue stamp, canceled 2, 10, '98, Z. D. H.]

87 [Endorsed:] Filed in the office of the clerk of the superior court of Richmond county, Georgia, this 28th day of November, 1898. Wm. E. Keener, clerk of the superior court, Richmond county, Georgia.

88 BOARD OF EDUCATION, ETC.,
v.
CUMMING ET AL.

By the COURT, per SIMMONS, *C. J.*:

1. The county board of education of Richmond county has the discretionary power, under the law, of establishing or discontinuing

high schools at such points in the county as the interests and convenience of the people may require.

2. Under the facts of this case, there was no abuse of such discretion by the county board in discontinuing the high school established for the colored race, although it left in operation a similar school for white females, and contributed to the support of a high school for white boys and girls which, however, it had not established.

3. The provisions of the act "to regulate public instruction in the county of Richmond," approved August 23, 1872, investing the county board of education of Richmond county with the powers above designated, are not violative of any provision of the constitution of this State or of the United States.

Petition for injunction, before Judge Callaway, Richmond county, December 22, 1897.

Ganahl & Ganahl, Frank H. Miller, and W. K. Miller, for plaintiff in error.

Salem Dutcher, Hamilton Phinizy, and J. S. Reynolds, *contra*.

SIMMONS, *C. J.*:

1 & 2. By an act approved August 23, 1872, a board of education was established for the county of Richmond. By the provisions of the act this board was composed of three freeholders from each militia district, three from each ward in the city of Augusta, and three from each incorporated town or village, other than the city of
89 Augusta, in the county. The act further provided that this board should meet and organize by electing one of their number as president and by electing a secretary. It gave this board power to employ teachers and to prescribe their qualifications. It provided that a certain part of the general school fund should be paid over to the board and authorized the board to levy such tax as it might deem necessary for public-school purposes. It made it the duty of the tax collector of the county to collect the tax and to deposit it to the credit of the board. The act also made the members of the board from each militia district and from each ward of the city trustees of the school of that militia district or city ward. In general it provided for a thorough system of public schools in the county. The tenth section of the act reads as follows:

"And be it further enacted, That the county board of education may establish schools of higher grade at such points in the county as the interest and convenience of the people may require, which schools shall be under the special management of the board at large, who have full power in respect to such schools; to employ, pay and dismiss teachers; to build, repair and furnish the school house or houses; purchase or lease sites therefor, or rent suitable rooms, and make all other provisions relative to such schools as they may deem proper. The funds for such purposes shall be deducted ratably from the quota apportioned to the respective school

districts. And the county board of education shall have full power and authority to charge such sums for tuition and incidental expenses in said schools of higher grades as the board, from time to time, may fix and determine."

(This last sentence was added as an amendment February 22, 1877.) In pursuance of this act the board established a high school for girls in the year 1876, and in 1878 a Mrs. Tubman presented the board with a lot and building
90 for the purpose of affording a higher education to the young women of the county. The board fixed the rate of tuition in this school at $15 per annum for residents of the county, under authority of the act of 1877, amending the act of 1872. In 1880 the board established the Ware high school for the colored race and fixed the rate of tuition at $10 per annum. In 1897, the board, ascertaining that it had not funds sufficient to carry on the colored high school and at the same time afford school privileges to some 400 colored children in the primary schools, after consultation among themselves and the patrons of the colored high school, determined to suspend the Ware high school for the time. Cummings and others thereupon filed their equitable petition against the board of education and the tax collector seeking to enjoin the collection of that portion of the tax levied for school purposes which was for the support of the Tubman high school and another high school in the county which had been established by the Baptist denomination and to which the board had made a small appropriation for that year. They alleged that such tax was illegal and void because the system of high schools now in operation is for the use and benefit of the white school population exclusively, and the board is not authorized by law to levy or the tax collector to collect from the tax-payers of the county any tax for the support of any system of high schools wherein the colored school population cannot have the same educational facilities as the white school population; that the board is now using the funds on hand and intends to use the tax levied for the support of the white high schools to the entire exclusion of the colored high school. Petitioners are persons of color and represent children of school age who are lawfully entitled to the full benefit of any system of high schools organized and maintained by the board of education, and by suspend-
91 ing the colored high school they are wholly debarred from any participation in the benefits of a high-school education, although they are being taxed therefor. They rely upon so much of the Constitution of the United States as declares that no State shall deny to any person within its jurisdiction the equal protection of the laws, and aver that the action of the board is a denial of the equal protection of the laws, and that it is inequitable, unlawful, and unconstitutional for the board to levy upon petitioners or for the tax collector to collect from them any tax for educational purposes, from the benefits of which petitioners, in the persons of their children of school age, are excluded and debarred.

The defendants demurred to the petition, and also filed an answer in which they denied that they had established any system of high

schools in the county, and alleged that the act of 1872 did not make it the duty of the board nor had it the authority under the organic law to establish such system. The board claimed that under the tenth section of the act (recited above) it had the discretion to establish high schools at such points in the county as the interests of the people might require, and that, in pursuance of that authority, it had established the above-mentioned schools.

Upon the hearing the court below sustained the demurrer of the tax collector, overruled the demurrer of the board of education, and enjoined the board from using, for the support and operation of the white high school, any of the funds or property now in its hands or hereafter to come into its hands for educational purposes until the board shall provide or establish for such colored children of high-school grade in the county as may desire a high-school education equal facilities in high-school education as are now main-
92 tained for white children. The court held that "the establishment and maintenance of schools of higher grade than common schools authorized by section 10 of the act (of 1872) is a matter that rests exclusively in the sound discretion of the board. But if the discretion is exercised in the establishment (of such schools) and (they are) maintained in harmony and in compliance with section 9 of said act, the board must provide the same facilities for the higher education of both races." The defendants excepted to the ruling of the court and bring the case here for review.

The act of 1872, incorporating the board of education of Richmond county, made it a public corporation and conferred upon it certain powers of government, mainly those of establishing public schools and levying and collecting a tax for their support. It made it compulsory upon the board to establish free common schools, but gave it a broad discretion in establishing high schools. It declared that the county board of education might establish schools of higher grade than common schools at such points in the county as the interests and convenience of the people might require. It left it solely with the board to determine whether or not it would establish high schools. It could establish one for females and none for males or *vice versa*, it could establish a white school and provide none for the blacks or *vice versa*, if the "interest and convenience of the people" required that they should do so. The matter is left to their discretion, and that discretion is a power "conferred upon them by law of acting officially in certain circumstances according to their own judgment and conscience, not controlled by the judgment or conscience of others." The powers conferred are legislative in their character. If, therefore, this corporate body was of the opinion that the interests of the people re-
93 quired it, it had a right to suspend the operation of the colored high school and appropriate the fund which had previously gone to that school to the primary schools. It could do so, if, in the judgment of its members, it was better for the interests of the people that 400 colored children should obtain the elements of a common-school education than for fifty or sixty colored children to receive the advantages of a high-school education, and in the ex-

ercise of their discretion they could consider the fact that these negro children of high-school age had acces- to some three private schools of that grade, where the tuition was less than it had been at the Ware high school and less than the tuition charged the white high-school children. The board was not given authority to establish a system of high schools, but to establish individual schools in their discretion. We think that they were certainly not required to establish a high school for negroes whenever they established one for whites. It may be and probably is true that the number of white children prepared for a high-school course is greater than the number of negro children prepared for such course. If one school will accom-odate all of the negro pupils of high-school grade, while it takes five schools to accom-odate the white children of similar grade, must the board establish five high schools for each race merely because the whites require that number? Certainly here it must be allowed a broad discretion. We do not mean to intimate that any public corporation of this kind can arbitrarily and without reason establish one school and suspend another, but where it is in its discretion to pass upon facts and determine from the best interests of the people at large, courts will not control its discretion unless it is manifestly abused, although the court may be of the opinion that the corporation erred upon the facts. But it is claimed that the board had
94 no discretion in this matter, and that its duties were fixed by the preceding (the ninth) section of the act. That section reads as follows: "And be it further enacted, That the county board of education, under the advice and assistance of the trustees in each ward or school district, shall make all the necessary arrangements for the instruction of the white and colored youths in separate schools. They shall provide the same facilities for each, both as regards school-houses and fixtures, attainments and abilities of teachers, length of term time, and all other matters pertaining to education; but in no case shall white and colored children be taught together in the same school." It will be observed, from a reading of this section, that the board acts upon the advice and assistance of the trustees in each ward or school district, and that upon this advice and assistance the board "shall make all the necessary arrangements for the instruction of the white and colored youths in separate schools." This section gives the board no discretion. It is compulsory upon it to establish proper arrangements to educate the children of both races and to provide the same facilities for each as to school-houses, fixtures, and the various other matters pertaining to education. This ninth section relates, in our opinion, entirely to the common schools and not to the matter of high schools. It does not control the board in the exercise of its discretion under the tenth section; that section relates to different and independent schools. The ninth section does not contemplate a system of high schools, as contended for by defendants in error. The schools to be established under the tenth section are separate from and independent of those established under the preceding section. They were not to be free schools, as contemplated in the other sections of the

act, but the pupils were required to pay tuition. It is there-
95 fore not a free high school. For these reasons and under the facts disclosed by the record we think that the board of education did not abuse its discretion in discontinuing the high school established for the colored race.

3. It is claimed in the petition that if the action of the board of education is authorized by the tenth section of the act of 1872 it is in violation of the Constitution of the United States and of this State. What provision of the constitution of this State is violated is not stated, either in the petition or in the brief of counsel. We know of no provision of the State constitution which is violated by the action of the board. It is claimed that this action is in violation of the 14th amendment to the Constitution of the United States. This point in the case was not argued before us by the learned counsel for the defendant in error, either orally or by brief, the only mention made of it in his brief being at the conclusion, where he says: "To deny the colored school population of Richmond county the equal protection of the educational laws of force in that county is to violate not only the State law, but the Constitution of the United States, fourteenth amendment." He cites no authority to sustain this contention. He does not point out in his brief which paragraph of the fourteenth amendment is violated. If it be the first, he does not point out what clause of that paragraph is violated, whether the privileges or immunities of citizens of the United States are abridged, whether his clients are deprived of life, liberty, or property without due process of law, or whether his clients are denied the equal protection of the laws. It is difficult, therefore, for us to determine whether this amendment has been violated. If any authority had been cited, we could from that have determined which paragraph or clause counsel relied
96 upon, but as he has left us in the dark we can only say that in our opinion none of the clauses of any of the paragraphs of the amendment, under the facts disclosed by the record, is violated by the board. There is no complaint in the petition that there is any discrimination made in regard to the free common schools of the county. So far as the record discloses, both races have the same facilities and privileges of attending them. The only complaint is that these plaintiffs, being tay-payers, are debarred the privilege of sending their children to a high school which is not a free school, but one where tuition is charged, and that a portion of the school fund, raised by taxation, is appropriated to sustain white high schools to which negroes are not admitted. We think we have shown that it was in the discretion of the board to establish high schools. It being in their discretion, they could, without a violation of the law or of any constitution, devote a portion of the taxes collected for school purposes to the support of this high school for white girls and to assist a country denominational high school for boys. In our opinion, it is impracticable to distribute taxes equally. The appropriation of a portion of the taxes for a white girls' high school is not more discrimination against these colored plaintiffs than it is against many white people in the county. A tax-payer

who has boys and no girls of a school age has as much right to complain of the unequal distribution of the taxes to a girls' high school as have these plaintiffs. The action of the board appears to us to be more a discrimination as to sex than it does as to race. While the board appropriates some money to assist a denominational school for white boys and girls, it has never established a high school for white boys, and, if the contention of these plaintiffs is correct, white parents who have boys old enough to attend
97 a high school have as much right to complain as these plaintiffs, if they have not more. Without, therefore, going into an analysis of the different clauses of the fourteenth amendment of the Constitution of the United States, we content ourselves by saying that, in our opinion, the action of the board did not violate any of the provisions of that amendment. It does not abridge the privileges or immunities of citizens of the United States, nor does it deprive any person of life, liberty, or property without due process of law, nor does it deny to any person within the State the equal protection of its laws.

Judgment reversed, all the justices concurring.

98 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *Nov.* 1*st*, 1898.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the supreme court of Georgia in the case therein stated.

Witness my signature and the seal of said court hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 2, 10, '98, Z. D. H.]

99 Supreme Court of the State of Georgia.

ATLANTA, GA., *March* 23, 1898.

The honorable supreme court met pursuant to adjournment. The following judgment was rendered:

BOARD OF EDUCATION OF RICHMOND COUNTY
versus
J. W. CUMMING ET AL.

This case came before this court upon a writ of error from the superior court of Richmond county, and, after argument had, it is considered and adjudged that the judgment of the court below be reversed, because the court erred in granting an injunction, all the justices concurring.

Bill of costs, $10.00.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *November* 1, 1898.

Seal Supreme Court of the State of Georgia, 1845.

I certify that the above is a true extract from the minutes of the supreme court of Georgia, and that Frank H. Miller paid the above bill of costs.

Witness my signature and the seal of said court affixed the day and year last above written.

Z. D. HARRISON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 2, 10, '98, Z. D. H.]

99½ [Endorsed:] Filed in office of clerk of the superior court of Richmond county, Georgia, this 28th day of November, 1898. Wm. E. Keener, clerk of the superior court of Richmond county, Georgia.

100 STATE OF GEORGIA, *Richmond County.*

I, William E. Keener, clerk of the superior court of said county, making return to the writ of error of the honorable the Supreme Court of the United States in the cause in said superior court lately depending, wherein J. W. Cumming, James S. Harper, and John C. Ladeveze were plaintiffs and The County Board of Education of Richmond County, State of Georgia, was defendant, do hereby certify that the above and foregoing typewritten pages, numbered consecutively from 1 to sixty-one (61), both inclusive, contain a full, true, and complete transcript of all the proceedings had in said cause in said superior court as the same are of file and record in the office of the clerk of said superior court.

And I do further certify that the above and foregoing transcript of bond of said plaintiffs, dated November 16th, 1898, is a full, true, and complete copy of said original bond as the same is now of file in said office.

And I do further certify that the assignment of errors, the citation, and the return of service on said citation hereunto annexed are the true original assignment, citation, and return filed in said office.

And I do further certify that the certified copy of the bill of exceptions in said cause and the certified copy of the opinion and judgment of the supreme court of Georgia in said cause hereunto annexed are the identical certified copies filed in said office in said cause.

In testimony whereof I have hereunto set my official signature

and the seal of said superior court on this the 29th day of November, A. D. 1898.

[Seal Superior Court, Richmond.]

WILLIAM E. KEENER,
Clerk of the Superior Court of Richmond County, Georgia.

[10-cent U. S. internal-revenue stamp, canceled ——, '98, W. E. K.]

Endorsed on cover: File No. 17,206. Georgia superior court, Richmond county. Term No., 621. J. W. Cumming, James S. Harper, & John C. Ladeveze, plaintiffs in error, *vs.* The County Board of Education of Richmond County, State of Georgia. Filed December 5th, 1898.

Injunction.

Richmond Superior Court, October Term, 1897.

CUMMING ET AL.
vs.
BOARD OF EDUCATION RICHMOND COUNTY.

And now comes the defendant, upon being served with the amendment or replication of the plaintiff, and in reply thereto says, subject to its demurrer of file:

1st. It admits that the institutions referred to in the first allegation are private educational institutions under sectarian control, and have no connection whatever with the public-school system conducted by this board, but says that the impression sought to be conveyed by said allegation that there is sectarian, denominational teaching enforced in said schools is untrue; that said schools are open to the public generally, and any child of sufficient scholarship and moral character can enter said schools, irrespective of his or her religious belief.

2nd. This defendant denies the allegations of paragraph two, and says that it has a right to charge for tuition in high schools.

3rd. This defendant denies the allegations of paragraph three, and calls for strict proof thereof at the hands of the plaintiff.

GANAHL & GANAHL,
FRANK H. MILLER,
D'f't's Att'y.

Supreme Court of Georgia, October Term, 1897.

THE BOARD OF EDUCATION OF RICHMOND COUNTY
vs.
J. W. CUMMING ET AL.

Filed in the clerk's office of Richmond superior court December 30, 1897.

J. B. KEENER, *D. C.*

Endorsed.

GEORGIA,
Richmond County.

Service acknowledged of a copy of the within bill of exceptions for J. W. Cumming, James S. Harper, and John C. Ladeveze, defendants in error.

Dec. 30, 1897.

SALEM DUTCHER,
H. PHINIZY,
J. S. REYNOLDS,
Att'ys for Def'ts in Error.

Counsel's P. O., Augusta, Ga.

Service acknowledged of the within bill of exceptions. Copy and all further service waived.
Dec. 30, 1897.

CHAS. S. BOHLER,
Tax Collector, Richmond Co., Ga.

Filed in the clerk's office of the supreme court of Georgia Jan'y 1, 1898.

LOGAN BLECKLEY,
D. C. S. C., Ga.

CLERK'S OFFICE, SUPREME COURT OF GA.,
ATLANTA, GA., *Dec.* 20, 1898.

I hereby certify that the above are true copies of entries on the original bill of exceptions of file in this office in the case above stated.

Witness my signature and the seal of said court, hereto affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Cl'k S. C. Ga.

[Ten-cent U. S. internal-revenue stamp, canceled 2, 12, '98, Z. D. H.]

Richmond Superior Court.

J. W. CUMMING, JAMES S. HARPER, and JOHN C. Ladeveze, Plaintiffs,
vs.
THE COUNTY BOARD OF EDUCATION OF RICHMOND County, State of Georgia, and Chas. S. Bohler, Tax Collector of said County.
} Petition in Equity.

STATE OF GEORGIA,
Richmond County.

I, William E. Keener, clerk of the superior court of the county of Richmond, State of Georgia, hereby certify the foregoing page, number one hereof, is a true and correct copy of the amendatory answer of the Board of Education of Richmond County filed by it in the above-stated case.

I further certify that what appears on page two hereof, save and except the certificate of the clerk of the supreme court thereon, is a true and correct copy of the endorsements appearing upon the copy — bill of exceptions retained in the clerk's office of the said superior court of Richmond county when transmitting the original bill of exceptions to the supreme court, pursuant to the order of the judge of the said superior court December 30, 1897.

I further certify that what appears on page one hereof was inadvertently omitted in making out transcript of the record in the

above-stated case and certified to by me November 29, 1898, for transmission to the Supreme Court of the United States.

In witness whereof I have hereunto set my hand and seal this seventh (7) day of January, 1899.

Seal Superior Court, Richmond.

WM. E. KEENER,
Clerk Superior Court, Richmond County, Georgia.

Supreme Court of the United States, October Term, 1898.

J. W. CUMMING, JAMES S. HARPER, and JOHN C. LADEVEZE, Plaintiffs in Error,
vs.
THE COUNTY BOARD OF EDUCATION OF RICHMOND County, State of Georgia. } No. 621.

In error to the superior court of Richmond county, State of Georgia

It is hereby stipulated and agreed between the counsel in the above-stated cause that the three preceding pages shall be filed with the clerk of the Supreme Court of the United States as a supplement to the transcript of the record filed December 5, 1898; the same to stand and be considered for all purposes whatsoever as if filed at the same time with the original transcript of the record, this agreement being entered into to avoid any suggestion of diminution of the record or application for certiorari in aid thereof.

GEO. F. EDMUNDS,
Counsel & Solicitor for Plaintiffs in Error.
JOS. GANAHL,
FRANK H. MILLER,
Solicitors for Defendant in Error.

[Endorsed:] Transcript of the record. Supreme Court of the United States, October term, 1898. No. 621. J. W. Cumming, James S. Harper, and John C. Ladeveze, plaintiffs in error, *vs.* The County Board of Education of Richmond County, State of Georgia. In error to the superior court of Richmond county, State of Georgia. Filed December 5, 1898. Original agreement between counsel to the filing of an additional portion of the record.

[Endorsed:] File No., 17,206. Supreme Court U. S., October term, 1898. Term No., 621. J. W. Cumming *et al.*, pl'ffs in error, *vs.* The County Board of Education of Richmond County, Ga. Stipulation and addition to record. Filed Jan'y 17, 1899.

No. 1164.

Motion to advance.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed Jan 24, 1899.

J. W. CUMMING, JAMES S. HARPER, AND JOHN C. LADEVEZE, PLAINTIFFS IN ERROR,

vs.

THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA.

MOTION TO ADVANCE.

Now come the said plaintiffs in error and respectfully move the court that said cause be advanced for hearing at the earliest practicable time in this present session.

For cause for the granting of this motion they respectfully state that the suit was brought in the proper court of the State of Georgia by them, being colored citizens of the United States and taxpayers for public school purposes in the county of Richmond, and having children suitable for and desirous of public high school education in Augusta, in said county, to compel the Board of Education either to give their children the advantages of public high school education enjoyed by the children of the white citizens there, or else to compel said Board of Education to refrain from carrying on white high schools for the support of which the plaintiffs were taxed.

There was no dispute in respect of the fact that the Board of Education was carrying on one or more public high schools for white children, and that it had abolished or suspended during its discretion the high school for colored children, which had been carried on for several years. There was no claim that there was not a sufficient number of colored children to warrant a high school for them, but

it was claimed that there was a greater need for the elementary education of colored children. What was the comparative need in respect of the schools for white children does not appear.

The case was heard in the Superior Court of Richmond County upon its merits, and it was there held that while the collector of taxes, who was made a party in the first instance, could not be enjoined from collecting the school taxes from the plaintiffs in error and other colored citizens, and he was dismissed, the School Board had no authority to continue to carry on public high schools for white children while they refused to continue to carry on a high school for the colored children. This was determined upon two grounds:—

First, because the statutes of Georgia did not justify such a course of conduct; and,

Second, because if they did they would be in violation of the Constitution of the United States.

See opinion of Judge Callaway. (Record, pages 35–38.)

From this decree the Board of Education appealed to the Supreme Court of the State, which held and determined that the statutes of Georgia authorized the School Board, in their discretion, to do the acts referred to, and that these statutes did not conflict with the Constitution of the United States. (Record, pages 53–58.)

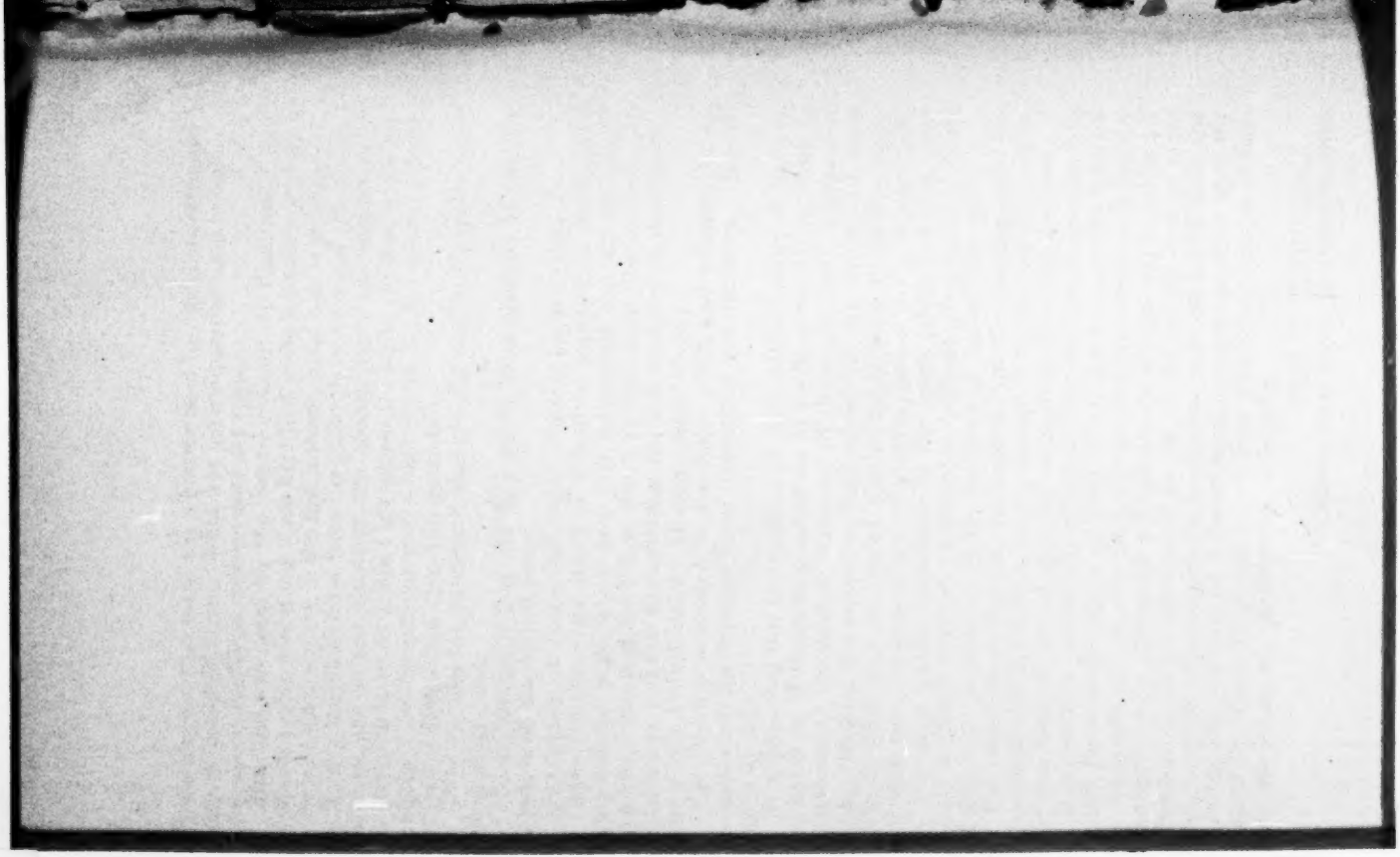
The case was remanded to the lower court, and pursuant to the judgment of the Supreme Court the petition was dismissed. (Record, pages 38, 39.)

It is submitted that the question of the constitutionality of the laws of the State of Georgia, as construed by its Supreme Court, affecting the *status* of the colored taxpayers of the whole State in respect of being taxed for the support of high schools for the children of white citizens, while they are denied similar public high school advantages for their own children, is one of peculiar, and, at this time especially, of very great public importance to the peace, safety, and good order of all the States in which considerable numbers of both races dwell, as well as to the interests of the taxpayers of the African race.

The record shows that this fundamental question, arising under the Constitution of the United States, was stated in the original petition, and was distinctly passed upon by the Supreme Court of the State.

It is therefore respectfully submitted that the case is one that falls within the seventh section of Rule 26 of this court, as one attended by the special and peculiar circumstances therein stated—it being one that involves the immediate public interests of equal opportunities for education of all the children of people of the colored race in every State in which separate schools for the two races are established; and involves, also, the right of a Government to impose taxation upon any class of its citizens for public objects from which they, because of their race, are denied any participation of benefits.

GEO. F. EDMUNDS,
Attorney and of Counsel for Plaintiffs in Error.



SUPREME COURT OF THE UNITED STATES.

J. W. Cumming, James S. Harper, and John C. Ladeveze, Plaintiffs in Error,

vs.

The County Board of Education of Richmond County, State of Georgia.

October Term, 1899.

No.

IN ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT.

On the 28th of November, 1898, the plaintiffs, citizens of the African race, filed their petition in said court, setting forth:—

First.—That they were citizens and residents, property owners and taxpayers in Richmond County.

Second.—That the defendant, the board of education, was a body existing for the management of schools in that county under an Act of the Georgia Legislature of August 23d, 1872.

Third.—That the board is empowered by law to levy and expend taxes in said county according to its judgment of what may be necessary for public school purposes.

(One Bohler, the collector of taxes, was also made party; but he was dismissed on the first hearing by the court, and the case has since proceeded as between the plaintiffs and the school board.)

Fourth.—That on July 10th, 1897, the board levied for that year for school purposes, including the high schools in said county, a tax of $4500, being two and two-tenths mills on each $100 taxable property, and that the tax was being collected and paid over for the school uses.

Fifth.—The petitioners made no objection to the tax, except as it regarded so much of it as was to be applied to the high schools.

Sixth.—They objected to that part on the ground that the school board were maintaining two white high schools for the benefit of the white children of the county and from which the colored children were excluded by the standing orders of the board. (Record, page 2.)

Seventh.—That at least $4500 of the tax had already been levied and collected, to be used by the board for the support of the high schools from which the children of the petitioners were excluded, although otherwise qualified, on account of their color.

Eighth.—That the board had then on hand large sums of money, the proceeds of taxes levied on the petitioners in common with other taxpayers, for the purposes of education; and that the board possessed large establishments for school purposes.

Ninth.—That the board has no right to expend any part of said funds for maintaining any system of high schools in the county wherein the colored school population is not given equal facilities for instruction; but that the said board, notwithstanding, had expended and was continuing to expend the moneys thus raised by the taxation of the petitioners for carrying on and supporting white high schools while it refused to keep up a colored high school.

Tenth.—That the board, on the 10th of July, 1897, abolished the colored high school that had heretofore existed, although it had sixty colored pupils, among whom were the children of all the petitioners; and it had refused on petition to provide any facilities for the high school education of colored children. (Record, pages 3, 4.)

Eleventh.—The petition set out that this denial by the board was in violation of the Constitution of the United States. It prayed that the tax collector be enjoined from collecting so much of the tax as related to the white high schools, and that the board be enjoined from using any funds so derived from taxation for maintaining the white high schools. (Record, page 4.)

The answer of the board admitted the *status* of the petitioners and the facts alleged, excepting that it asserted a want of information as to whether the petitioners had children who had been enjoying the benefits of the colored high school so abolished. It admitted that it had maintained, and was continuing to maintain, two white high schools, one for girls and one for boys, from which colored children were excluded. (Record, page 11.) It contended that the colored high school was abolished with the best of economical motives, alleging that large numbers of young colored children were being turned away from the primary grades for want of accommodation, and asserted that a great many more children of the primary grades could be accommodated in the building used for a colored high school than there were colored scholars in the high school. It did not claim that the white primary schools were not adequate for the full accommodation of all children, or that the white high schools were overcrowded, or that any children were excluded therefrom for want of suitable accommodations. It did claim that there were three private and sectarian schools for colored children where

the then sixty or more colored children attending the colored high school when it was abolished could get the same advantages for the same tuition fees that they had to pay in the abolished public school; and therefore they ought to be contented.

The management and control of the primary schools are in the local trustees, and not the board. (Record, page 12.)

The board admitted that the cost of the white high schools would be $4500 for the then current year. It admitted that it was using the tax funds for carrying on the two white high schools, and intended to continue so doing. (Record, page 13.) And it insisted that this action of the board did not deny the colored race the full protection of the law, and so forth. (Record, page 14.)

Twelfth.—The board, in Exhibit C, attached to its answer (Record, pages 18, 19), declared its ground for action in abolishing the colored high school to be "that the board of education is not liable to maintain the negro high school and also extend the negro primary schools," for the reason that the lack of funds forbade it. And that, as before stated, the private colored schools could give the colored children increased education without additional personal expense. (Record, page 19.) In the same series of exhibits, and at the same time, the board sets forth the excellent progress of the two white high schools, and nowhere makes any suggestion of want of accommodation or lack of funds, either for the primary or high schools.

It was proved that each one of the petitioners had a child or children attending the colored high school when it was abolished, and that they protested against its abolition. (Record, pages 22, 23, 24, 25.)

It was also proved that about $32,000 derived from the State taxation of the complainants and the other taxpayers of the county and State was the quota belonging to the board for expenditure in that year. (Record, pages 25, 26.)

It appears that the colored high school so abolished was established in 1880 on the recommendation of the superintendent of schools upon the ground that the law required equal facilities for the education of the two races, and that its establishment would be only an act of tardy justice. And that the school board at that time unanimously agreed on the propriety of its establishment. (Record, page 26.) But on its abolition the board voted that it would reinstate the colored high school whenever, in its judgment, it thought it could afford it. (Record, page 29.)

The tax at that time levied for schools by the board being only one-quarter of one cent on each $100 of property.

It appeared that the salaries for the white high schools were upwards of $6500 per year, and for the colored high school, which was so abolished, was only about $1000. It appeared that the salaries for the white primary schools amounted to more than $47,000, while the salaries for the colored primary schools

amounted to only a little more than $13,000. (Record, page 29.)

On this state of facts, none of which were in dispute, the Richmond County Superior Court dismissed the tax collector, but granted the prayer of the petitioner against the school board, enjoining it from using the public funds for maintaining the white high schools until the board shall provide facilities for high school education for colored children, of the same character, upon the ground that the conduct of the school board was in violation of the school laws of the State; and, if it were not, that it would be in violation both of the Constitution of Georgia and of the Fourteenth Amendment of the Constitution of the United States. (Record, pages 35–38.)

From this decree the board of education appealed to the Supreme Court of the State. The Supreme Court of the State on the 23d of March, 1898, reversed the decree of the Superior Court on the ground, as appears in its opinion, that the establishment or refusal to establish high schools for colored children, although the high schools for white children were established and paid for by taxation, was entirely a matter in the discretion of the school board, and that the colored taxpayers could be lawfully compelled to pay taxes for the support of white schools, although the authorities refused to establish colored high schools when, as in this case, there were a sufficient number of pupils qualified and desirous of and seeking to be thus educated. And that such action of the school board was not in violation of the Constitution of the United States. (Record, pages 53–58.)

The case was thereupon remitted to the Superior Court and the petition dismissed. (Record, pages 38, 39.) Whereupon this writ of error was sued out.

ASSIGNMENT OF ERRORS.

The complainants aforesaid assign for error :—

First.—That the statute of the State of Georgia, as construed by the Supreme Court of Georgia, giving a discretion to the said county board of education to establish and maintain high schools for white persons and to discontinue and refuse to maintain high schools for persons of the negro race, was, and is, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof.

Second.—That the said court decided and held that the Constitution of the United States was not violated by the action of the said board in establishing and maintaining public high schools for the education of white persons exclusively, and in refusing to establish and maintain high schools for the education of persons similarly situated of the negro race.

Third.—In deciding and holding that persons of the negro race could, consistently with the Constitution of the United States, be by the laws or authorities of Georgia, taxed, and the money derived from their tax-

ation be appropriated to the establishment and maintenance of high schools for white persons, while pursuant to the same law the said board, at the same time, refused to establish and maintain high schools for the education of persons of the negro race.

Fourth.—That the said Superior Court erred in dismissing the complaint of the plaintiff in error.

POINTS.

1. As construed by the Supreme Court of Georgia, the Constitution and laws of that State justified the board of education in maintaining, at the expense of the plaintiffs, public high schools for white children, and in abolishing and refusing to keep up any similar or equivalent school for the education of colored children. The record shows that the colored high school was necessary for the education of the same class of colored children as that of the white children, for which two public high schools were provided. It shows that there was a sufficient number of colored children receiving the benefits of the colored high school when it was abolished, and that their parents protested against its abolition. It shows that the defendants themselves considered the colored high school necessary by declaring, in connection with their abolition of it, that they would reinstate it "whenever the board, in their judgment, could afford it." (Record, page 29.)

2. It may be assumed that the decision of the Georgia Supreme Court, that the Constitution and laws of that State warranted the action complained of (whether reviewable here or not) was correct, although it would seem reasonably clear that the opinion of the inferior court was the sound one, unless the Constitution and laws of Georgia were designed by their framers to be illusory.

3. The question, then, is whether the board of education, under its authority to "establish schools of higher grade at such points in the county as the interests and convenience of the people may require," authorized it to establish and maintain the advanced schools for the sole interest of the white children, and to refuse to maintain a similar school for the benefit of the colored children, while (though this makes no difference in principle) the parents of such colored children were being taxed and their money expended to maintain such higher grade white schools? Although the first section of the eighth article of the Constitution of Georgia only made it *compulsory* that common schools should be established for the elementary branches of an English education, and required the races to be taught separately, the fourth section authorized counties and cities to tax for public schools, and to maintain them out of such taxation. It is under this authority that the public schools in the county of Richmond are carried on. This authorizes the counties and cities to go beyond elementary English education, and to provide, as most civilized States do, for that larger education which

teaches not only reading, writing, and arithmetic, but those things which lead to the enlargement of mental perceptions, respect for social order, and, indeed, everything that may tend to make the best state of society. It is under this authority that the board of education has undertaken to discriminate distinctly and by name between the two races, and to impose upon one burdens of taxation from which they and their children receive no benefit, for the purpose of giving educational benefits necessary to public interests, to the white children alone. The sole pretense for this discrimination is, as expressly stated by themselves, that they cannot afford it. That is, that all of the public funds applicable to education of the higher grade in the public schools shall be devoted to the benefit of the white children, and none of it applied for the similar education of colored children, The excuse stated being that the board does not wish to increase taxation which they have the power to impose (then only one-fourth of one cent per $100), and that it can make good use of the money that would otherwise be expended in support of a colored high school, for the elementary education of some colored children for which the common school houses at that time furnished no accommodation. It is not anywhere hinted by the defense that there were not adequate accommodations for all the white children, both in the common and high schools; from which it conclusively follows that the public funds have been devoted to the complete provision for all the white children, when they had not for the colored children. The board of

education was, under the law as construed, the master of all this. Every provision, therefore, having been made for the full education of the white children, and inadequate provision having been made for the elementary education of the colored children, the board abolishes the colored high school because it cannot afford to maintain it. This, it is earnestly submitted, is not the reasonable exercise of such discretion as the board may have lawfully had, or the exercise of any discretion at all. It is the arbitrary denial of the equal protection of the laws to these persons of the colored race. It is believed that all the numerous decisions of this court upon this and analogous subjects are agreeable to the foregoing statement. It is unnecessary to refer to more than a very few of them.

In Chicago, Burlington, &c., Railroad *vs.* Chicago, 166 U. S., page 226, it was held that the prohibitions of the Fourteenth Amendment referred to all the instrumentalities of the State, legislative, executive, and judicial, and that if any public officer under a State Government deprives another of any right protected by that amendment he violates the Constitution. In Gulf, &c., R. R. *vs.* Ellis, 165 U. S., page 154, it was declared that constitutional provisions of the character herein questioned should be liberally construed, and that the courts should be watchful to guard against any stealthy encroachments thereon, and that otherwise the protecting clauses of the Fourteenth Amendment would be a mere rope of sand, in no manner restraining State action. It declared that classifications and distinctions could not be made arbitrarily.

In this case the discrimination was arbitrary, no matter how good the motive of the board may possibly have been. If such action can be upheld, the board will forever be the sole judge of when it can "afford" to give the colored race the same advantage of public education that they tax them to give to the whites. If there is really any life or spirit in the Fourteenth Amendment, such conduct cannot be upheld. In Yick Wo *vs.* Hopkins, 118 U.S., 356, this court said that, in spite of what the State court might have thought about it, it would put upon the ordinances of San Francisco an independent construction, and determine whether the proceedings under them were in conflict with the Constitution of the United States or not. In that case the ordinance vested in a board of supervisors the discretion of granting or withholding their assent to the use of wooden buildings as laundries, and so forth. The State court held that that was a discretion not judicially reviewable. This court denied the proposition, and held that while the ordinance gave absolute power to the board, the power was not confided to it as a discretion of regulation, but was to be exercised at their mere will, and that, so construed, it could not be maintained when exercised so as to produce inequality. This court held that the Fourteenth Amendment required "not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights;" and that "no greater burdens should be laid upon one than

are laid upon others in the same calling and condition." This court held that the principles upon which our Constitution rests do not "mean to leave room for the play and action of purely personal and arbitrary power." And it held that where the law gives a discretion, that discretion cannot be used, under color of regulating, to subvert or injuriously restrain a right, and that such questions are always open to judicial inquiry. To use the language of this court in that case, the board has, in the exercise of its authority applied and administered the law with "an unequal hand, so as practically to make unjust and unethical discriminations between persons in similar circumstances, material to their rights;" and that in such case "the denial of equal justice is still within the prohibitions of the Constitution." The case of Plessy *vs.* Ferguson, 163 U. S., 537, chiefly relied upon by the other side, is entirely consistent with and supports our contention. The case itself determined that a State law requiring separate railway carriages for the two races was valid, if provision were made for equal accommodations for both races, and the case stood upon the solid and indispensable ground that neither race was discriminated against in any particular, and it quoted with approval the opinion of the Court of Appeals of New York, that "when the Government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized," and so forth. In Strauder *vs.* West Virginia, 100 U. S., page 303, this court held that the Fourteenth Amendment "was de-

signed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment whenever it shall be denied by the States." The court further said that the words of the amendment, while prohibitory, "contained by necessary implication a positive immunity of right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—the exemption from legal discriminations implying inferiority in civil society, lessening the security of their rights which others enjoy," and so forth.

4. It will thus be seen that the fact that the school board had authority to establish and maintain public high schools at convenient places, and so forth, gives them no authority to establish and maintain public high schools for one race and to refuse to maintain them for the other, when the conditions and necessities for that advanced education existed in one race as well as the other in the place where their authority was to be exercised. These necessities and conditions are by the evidence of the board itself proved to exist.

The necessity for the public high schools for the colored children is, I repeat, distinctly confessed, and the only pretense of excuse for abolishing it, as stated by the board itself, was that it could employ the money necessary for its maintenance more advantageously by devoting it to common school purposes, while it could continue to employ all the money necessary to carry on the two white high schools in the same place. The mere statement

of the case, in view of what this court has already decided, condemns such conduct, no matter how good the motive or how ethically wise the action of the board may have been had it not been restrained by the fundamental provisions of the Constitution, although it is not by any means admitted that the motive of the board was purely in the public interest further than to avoid raising taxes to carry on the colored schools as well as the white ones, and although it is denied that the action was ethically wise.

5. In respect of the contention stated in the brief on the other side that Bohler, the tax collector, should have been made a party to this writ of error, it is sufficient to say that the petition as to him was dismissed by the Superior Court at the hearing (Record page 38), and that no appeal was taken by the petitioners. And it appears that when the case was remitted from the Supreme Court of Georgia that only the board of education had judgment for its costs Bohler having disappeared, as before stated. (Record, pages 38, 39.) And it further appears that it was only the board of education that took exceptions and carried the cause to the Supreme Court of the State. (Record, pages 43-46.) The whole relief sought against Bohler was denied, and the petitioners acquiesced. Bohler therefore ceased to be any longer interested in the cause or a party thereto. His presence as a party was not in any respect essential or proper for that part of the controversy remaining. It may be said with all respect to the learned counsel on

the other side that his point as to parties is an imaginary technicality, even if the record does not show a formal dismissal of Bohler. (See 113 U. S., page 548.)

The provisions of the Constitution and statutes of Georgia on the subject are annexed.

GEO. F. EDMUNDS,
Of Counsel for Plaintiffs in Error.

CUMMING CASE.

Constitution of Georgia, adopted December, 1877.

ARTICLE VIII.

EDUCATION.

"SECTION 1. *Common Schools.*—There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races."

"SEC. 4. Counties and cities may tax for public schools. Authority may be granted to counties, upon the recommendation of two grand jurors, and to municipal corporations, upon the recommendation of the corporate authority, to establish and maintain public schools in their respective limits, by local taxation; but no such local laws shall take effect until the same shall have been submitted to a vote of the qualified voters in each county or municipal corporation, and approved by a two-thirds vote of persons qualified to vote at such election; and the General Assembly may prescribe who shall vote on such question.

"SEC. 5. *Local Schools not Affected.*—Existing local school systems shall not be affected by this Constitution. Nothing contained in section 1 of this article shall be construed to deprive schools in this State, not common schools, from participation in the educational fund of the State, as to all pupils therein taught in the elementary branches of an English education."

(Code of 1892, pages 1832–2.)

The Act of August 23d, 1872, "To regulate public instruction in the county of Richmond," is as follows:—

"SECTION 1. That from and after the first Saturday in January, 1873, the general interest of education in the county of Richmond shall be confided to the control and management of a board of education, consisting of three legal voters, freeholders in said county, from each militia district, three from each ward in the city of Augusta, and three from each incorporated town or village other than the city of Augusta, in said county. On the first Saturday in November, 1872, the legal voters in each district, ward, incorporated town or village, shall elect three freeholders from their number as members of the county board of education; one for a term of three years, one for a term of two years, and one for a term of one year, and annually thereafter said legal voters shall, on the first Saturday in November, elect one member of the county board for a term of three years. The ordinary of Richmond County, for the time being, shall be *ex-officio* a member of the said county board of education.

"SEC. 2. That the said board of education shall be a body politic and corporate in law, and as such may contract and be contracted with, sue and be sued, plead and be impleaded in any court of the State having competent jurisdiction, and receive any gift, grant, donation, or devise made for the use of schools within their jurisdiction, and moreover, they shall be, and they are hereby, invested in their corporate capacity with the title, care, and custody of all schoolhouse sites, school libraries, apparatus, or other property belonging to the educational department of the county as now organized or hereafter to be organized, with all power to control, lease, sell, or convey the same, in such manner as they may think will best subserve the interest of common schools and cause of education.

"SEC. 3. That the members of the county board shall meet on the second Saturday in January, 1873, at the hour of 12 M., at the court house, in the city of Augusta; and having administered to each other an oath, or affirmation, faithfully and impartially to discharge the duties of their office, they shall organize by electing one

of their number as president, and by electing as secretary any citizen of Georgia having experience and skilled in the business of education, which latter office, by virtue of such election, shall become the county school commissioner; the president and county school commissioner shall each hold their offices for the space of three years from and after the day of their installation; ten members of the board shall constitute a quorum for the transaction of business; the board shall have authority to fix the number of and occasion of its regular meetings, and the president may call special meetings: *Provided*, That all regular or special meetings shall be held in the city of Augusta: *And provided further*, That no special meeting shall be legal unless after due publication in the city papers, or after special notice from the secretary to each and every member; in the absence of the secretary at any meeting the president shall appoint a secretary *pro tem.*, and, in the absence of the president, if a quorum be in attendance, the board may proceed to business by electing a president *pro tem*; by a three-fourths vote the county board shall have authority to remove the county commissioner before the expiration of his term of office, and to elect a new commissioner in his stead: *Provided*, That the said board shall state their reasons for such dismissal to said commissioner if desired by him; the county board shall also have authority to fill any vacancy which may occur in their number from any ward district, incorporated town, or village, in said county; and the person chosen by them to fill such vacancy shall serve for the entire unexpired term of the member deceased, resigned, or disqualified; if deemed expedient, the board may adopt by-laws for its own government.

"SEC. 4. (Relates solely to appointment of teachers, &c.)

"SEC. 5. *And be it further enacted*, That the county board of education shall control the financial department of the public school system. On or before the fifteenth day of December in each year, the State School Commissioner shall remit, at his discretion, such quota of the public school fund as may be apportioned to Richmond County, to any solvent chartered bank in the city of Augusta, to be selected by him for this purpose, and deposit the same therein to the credit of the county board of education. In the same bank the county tax collector shall deposit, to the credit of the county board,

all amounts he may collect under any school tax levied as hereinafter provided. Certificates of deposit from such bank shall be sufficient and legal receipts to the State Commissioner and the tax collector, for all intents and purposes, of their respective offices, under the laws of this State. No portion of the school fund shall be drawn from the bank except upon checks, supported by sufficient vouchers, authorized by the county board of education and signed by its president and secretary: *Provided*, That it shall be competent, at any time, for the county board, under orders from the State School Commissioner, to withdraw the county school fund from the bank which he may previously have designated, and deposit the same in any other bank which he may thereupon deem it proper to designate: *And provided further*, That in case of war, or other unusual emergency, the county board shall have authority to take whatever steps are necessary for the safe custody of said county school fund: *And provided further*, That in the expenditures by the board of the county school fund, one-third of such fund shall be equally divided between the several school districts, and the remainder, after paying all proper expenses of the board at large, be apportioned upon the basis of the aggregate number of youths in such districts between the ages of six and eighteen years. The quota apportioned for each school district shall be used for such purposes as may be prescribed by the local trustees for such school districts as hereinafter provided. The county school board shall fix the salaries and superintend the payment of the teachers. The account of every teacher must be indorsed by at least two members of the board from the school district in which the teacher is employed, certifying that the amount is correct and has not been paid, and that the teacher has furnished all reports and statements as required by law. The county board shall have authority to pay any account rendered by the keeper of a private school for any children between the ages of six and eighteen years, actual residents of Richmond County: *Provided*, That such accounts shall be certified in the same manner as those of teachers regularly appointed for the public schools: *And provided further*, That the said private teacher shall have received a regular certificate of competency from the county board.

"SEC. 6. *And be it further enacted*, That the members of the county board shall act as trustees for their respective school

districts. As trustees in such districts, they shall have exclusive authority to employ and dismiss teachers; to examine and pass upon teachers' accounts before presentation of the same to the county board; to visit and examine the schools within their jurisdiction as often as they may deem necessary, inviting, whenever expedient, proper persons to assist them in such duty: *Provided*, That the trustees shall not employ as teachers any person who is without a certificate of competency from the county board. The trustees in any ward or school district shall have authority to exclude any book or books from use in the exercises of any school within their jurisdiction, when, in their judgment, such course may be deemed wisest and best. It shall be the duty of the trustees to record their proceedings in a book provided for the purpose, together with the minutes of all school meetings held within their respective school districts, which minutes shall be signed by a majority of such trustees. The trustees in each school district shall have exclusive authority to establish such schools within their jurisdiction as, in their judgment, may be expedient.

"SEC. 7. *And be it further enacted*, That in all matters mentioned in section 6, the trustees shall be free and independent of the county board; but it shall be the duty of the said trustees to manage and control the other local interests of their respective school districts, subject to the rules and regulations prescribed by the county board at large. The trustees shall not have authority to levy any tax for local expenses, but shall certify and forward all bills, claims, or accounts pertaining to their school districts to the county commissioner for the approval of the county board. Should the local trustees in any school district fail to discharge their duties in regard to the school within their jurisdiction, it shall be the duty of the board at large to perform such duties and secure to such schools the same privileges enjoyed by other schools in the county.

"SEC. 8. *And be it further enacted*, That it shall be the duty of the trustees in each school district to take, or cause to be taken annually, between the first and fifteenth day of October in each year, an enumeration of all the unmarried white and colored youths, noting them separately, between the ages of six and eighteen years, residents within such school district, and not temporarily there,

designating between male and female, and return a certificate copy thereof to the county commissioner.

"SEC. 9. *And be it further enacted*, That the county board of education, under the advice and assistance of the trustees in each ward or school district, shall make all necessary arrangements for the instruction of the white and colored youth in separate schools; they shall provide the same facilities for each, both as regards school-houses and fixtures, attainments and abilities of teachers, length of term time, and all other matters appertaining to education, but in no case shall white and colored children be taught together in the same school.

"SEC. 10. *And be it further enacted*, That the county board of education may establish schools of higher grade, at such points in the county as the interests and convenience of the people may require, which school shall be under the special management of the board at large, who shall have full power, in respect to such schools, to employ, pay, and dismiss teachers, to build, repair, and furnish the schoolhouse or houses, purchase or lease sites therefor, or rent suitable rooms, and make all other necessary provisions relative to such schools as they may deem proper; the funds for such purpose shall be deducted ratably from the quota apportioned to the respective school districts.

"SEC. 11. *And be it further enacted*, That each member of the county board of education shall receive the sum of two dollars for his services at each meeting of said board, upon which he shall be in actual attendance, which amount shall be paid out of the school fund in the same manner as other bills: *Provided*, That no member of said board shall receive more than two dollars for services during any one month: *And provided further*, That the members of said board shall not receive any compensation for their services as trustees in their respective school districts.

"SEC. 12. *And be it further enacted*, That it shall be the duty of the county commissioners to be present at the meetings of the board, and record in a book, provided for the purpose, all their official proceedings, which shall be a public record open to the inspection of

any person interested therein; all such proceedings, when so recorded, shall be signed by the president and county commissioner, as secretary of the board. The county commissioner shall also provide a blank book, in which he shall keep the minutes of his own official proceedings; he shall deliver to his successor said record and all the books, papers, and property appertaining to his office; he shall report annually to the State School Commissioner the names of all persons to whom he has granted licenses, with the grade of such licenses, giving the number of males and females, the number, but not the names, of all whose applications for licenses have been rejected, and also the names of those whose licenses have been revoked.

"SEC. 13. *And be it further enacted*, That the county commissioner shall constitute the medium of communication between State and School Commissioner and subordinate school officers, and also between the State School Commissioner and the schools; he shall visit every school in the county, at least once in every two months, for the purpose of increasing their usefulness, elevating, as far as practicable, the poorer schools to the standard of the best, endeavoring to promote uniformity in their organization and management, and to secure their obedience to the school laws, and their compliance with the regulations of the State School Commissioner; he shall receive from the trustees their reports of enumeration and all other reports required by law from the said trustees, and he shall gather all necessary information in regard to private schools, high schools, colleges, and other institutions of learning, and, combining such information, he shall forward to the State School Commissioner, on or before the first day of November in each year, a complete report of the educational facilities afforded by the county; he shall advise with the trustees and teachers in regard to all matters pertaining to their respective duties, furnishing them with regular forms, blanks, instructions, regulations, and reports issued from the Department of Education.

"SEC. 14. (Relates only to pay of county commissioner.)

"SEC. 15. (Relates only to power over teachers.)

"SEC. 16. *And be it further enacted*, That at their first meeting in January of each year, or as soon thereafter as practicable, the county board, by a two-thirds vote of all its members, shall levy such tax as they may deem necessary for public school purposes; it shall be the duty of the county commissioner to make out an assessment and return of such tax against all the legal taxpayers in the county and furnish a copy of said assessment and return to the county tax collector, whose duty it shall be to collect the said tax and deposit it to the credit of the county board in such bank in the city of Augusta as may be designated by the State Commissioner for the deposit of the county school fund.

"SEC. 17. *And be it further enacted*, That it shall be the duty of teachers conscientiously to the utmost of their capacity to instruct the youth committed to their care, imparting to them knowledge of the studies embraced in the curriculum of the school, instilling into their minds and hearts the eternal principles of right and truth, and endeavoring to inspire their natures with courage, love of country, and reverence for the great and good.

"SEC. 18. (Relates only to reports of teachers.)

"SEC. 19. *And be it further enacted*, That admissions to all the public schools of the county shall be gratuitous to minors, between the ages of six and eighteen years, who are the children, wards, or apprentices of actual residents in Richmond County: *Provided*, That the county board shall have power to admit to said public schools other pupils, upon such terms, or the payment of such tuition, as the board may prescribe.

"SEC. 20. *And be it further enacted*, That no general law upon the subject of education, now in force in this State, or hereafter to be enacted by its General Assembly, shall be so construed as to interfere with, diminish, or supersede the rights, powers, and privileges conferred upon the Board of Education of Richmond County by this Act, unless it shall be so expressly provided by designating the said county and board under their respective names.

"SEC. 21. (Repeals conflicting laws.)

"Approved August 23d, 1872."

Another Act of August 23d, 1872, "To perfect the public school system and to supersede existing school laws," provided:—

"SEC. 12. That hereafter each and every county in the State shall compose one school district, and shall be confided to the control and management of a county board of education."

An Act of Georgia of February 22d, 1877, "To amend an Act entitled 'An Act to regulate public instruction in the county of Richmond,' approved August 23d, 1872, provided: 'That from and after the passage of this Act, section 10 of the above-mentioned Act be amended by adding thereto the following clause, to wit: And the county board of education shall have full power and authority to charge such sums for tuition, and incidental expenses, in said schools of higher grade, as the board, from time to time, may fix and determine.'"

SEC. 2. (Repeals conflicting laws.)

Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 164.

J. W. CUMMING, JAMES S. HARPER, AND JOHN C. LADEVEZE, Plaintiffs in Error.

vs.

THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA, Defendant in Error.

Brief of FRANK H. MILLER for Defendant in Error.

STATEMENT OF THE CASE.

Plaintiffs in error, persons of color and parents of children of school age, filed a verified petition in equity in Richmond Superior Court against the Board of Education and Tax Collector, to enjoin the collection of the tax levied by the Board of Education July 10th, 1897, pursuant to the act to regulate public instruction in the County of Richmond, approved August 23rd, 1872, P. L. 456. This petition alleged that the Board had established a *system of primary schools, a system of intermediate schools, a system of grammar schools, and a system of high schools in the County.* That ten per cent. of the tax assessed would be used by the Board for the support of the system of high schools. That this was illegal, because the Board, after having organized and maintained up to the time of the tax levy and for many years prior thereto, a system of high schools, where the colored school population had the same educational advantages as the white school population, on July 10, 1897, withdrew and denied to the colored school population any admission to or participation in the educational facilities of the high school *system*, and has voted to continue to deny to them any admission to or participation in these educational advantages. Pleading and relying on so much of the supreme law of the land, to-wit: *the Constitution of the United States* as declares that no state shall deny to any person within its jurisdiction the *equal protection of the laws*, they averred that the said action of the Board *was a denial of the equal protection of the laws*, and such as is forbidden by the said Constitution.

The petitioners prayed an injunction against the tax collector from collecting so much of the tax as had been levied for the support of the

system of high schools, and against the Board of Education from using *any funds or property for educational purposes* in said county for the support, maintenance or operation of said *system of high schools*. An interlocutory rule was issued to show cause why the relief prayed for in the petition should not be granted, and hearing was had thereunder.

The tax collector demurred, among other grounds, because plaintiffs made no such case as would authorize judicial interference by injunction with the system of taxation established by the Board of Education pursuant to the law of its creation said Act of Aug. 23, 1872.

The Board demurred for want of equity. It answered, admitting it had established the Ware High School for colored people but had discontinued it *temporarily* because 400 negro children were turned away from the primary grade unable to be provided with seats or teachers, and the same means and the same building which was used to teach *sixty* high school pupils would accommodate 200 pupils in the rudiments of an education, and because the Board at that time *was not financially able to erect buildings and employ additional teachers for the large number of colored children who were in need of primary education.* That there was at that time in the City of Augusta three public high schools which were public to the colored people and were charging fees no larger than had been charged by the board for pupilage in the Ware High School. That with these means and buildings the Board had established three primary schools for colored children, which were organized, established, and in operation when the petitioners filed their bill. The Board denied the allegation that the said Act of 1872 denied to the colored race equal protection of the law, or that the course and conduct of the Board thereunder was obnoxious to this constitutional limitation.

The Board admitted in its answer that under a petition for re hearing, when representatives of the colored race were present representing the interests of the primary schools, and the high schools, it had adhered to its former decision, but had resolved *to reinstate the Ware High School whenever the Board could afford it.* That the effort of the Board was to give more of the blacks an education in the elementary branches of an English education, and if there was any discrimination it was in favor of the little negro as against his more advanced brother.

As to the disposition of the fund when collected, they say, Record 15, "The school fund at the disposal of the board is annually divided according to the school population among the city wards, the five country districts, and the two villages, after reserving a fund for the general expenses of the board and for the high schools. By this means each set of local trustees can see the amount at their disposal and can regulate their schools accordingly. They can have few or many teachers, a long or a short term, build and repair just as they please and as their funds permit.

"Each district, village, and the city wards run a separate set of schools, and yet the whole system is controlled by one Board of Education, and the actions of the various local trustees are under the supervision of suitable committees from the general board. The secretary and county school commissioner is in general charge of the whole. The teachers in the high schools are chosen by the conference board of

the city trustees, which consists of the 15 members from the 5 wards. Those in the country districts are chosen by the local trustees in which the district is situated." The Court below, Printed Record 35, held the Act of '72 creating the Board of Education of Richmond County, vested in that board large discretionary powers, and the exercise of these discretionary powers are in most instances not subject to control, revision or alteration of any court or any other governmental agency; but found it had no power, discretion, or authority save those given by the Act of the legislature creating the board and the acts amendatory thereof—and every exercise of discretion or power by the board, whether it be characterized as legislative, judicial, or executive, must be exercised within the limits of the authority delegated by the legislature. The Court then, construing the ninth and tenth section of the Act of '72, held that the discretion authorized to be exercised by section ten, was controlled by the provisions of section nine, and that the board must provide the same facilities for higher education for both races; stating that this construction placed upon the Act of '72 is not violative of the provisions of the constitution of 1868 nor of the fourteenth amendment of the Constitution of the United States, *but, if the construction contended for by the defendants is placed upon the act, it would in his opinion be repugnant to both*: He thereupon sustained as cause under the rule, Record 38, the demurrer of the tax-collector and overruled the demurrer of the board, granting the second prayer of the plaintiff's petition, Printed Record 4, to-wit, "That said board be enjoined from using any funds or property now in or hereafter coming into its hands for educational purposes in said county for the support, maintenance, or operation of said system of high schools."

The Court below in passing thereon, Printed Record 37, found it immaterial, to determine the right to charge tuition, because not sufficiently raised, and because counsel for plaintiff in his argument stated that he did not desire the Court to consider the question otherwise than in its bearing upon the right of the colored race to have equal high school facilities as the white children.

To this decision the Board of Education excepted and made parties to the writ of error the plaintiffs and the tax-collector. The judgment of the Court below was reversed, Printed Record 53, wherein the Court say, page 57.

"It is claimed that this action is in violation of the 14th amendment to the Constitution of the United States. This point in the case was not argued before us by the learned counsel for the defendant in error, either *orrally or by brief*, the only mention made of it in his brief being at the conclusion, where he says: To deny the colored school population of Richmond county, the equal protection of the educational laws of force in that county is to violate not only the State law, but the Constitution of the United States, fourteenth amendment. He cites no authority to sustain this contention. He does not point out in his brief which paragraph of the fourteenth amendment is violated. If it be the first, he does not point out what clause of that paragraph is violated, whether the privileges or immunities of citizens of the United States are abridged, whether his clients are deprived of life, liberty, or property without due process of law, or whether his clients are denied

the equal protection of the laws. It is difficult, therefore, for us to determine whether this amendment has been violated. If any authority had been cited, we could from that have determined which paragraph or clause counsel relied upon, but as he has left us in the dark we can only say that in our opinion none of the clauses of any of the paragraphs of the amendment, under the facts disclosed by the record, is violated by the board."

The mandate of the Supreme Court was made the judgment of the Court below and plaintiffs were then refused all relief. Record 39 *by a dismissal of their petition.*

CHRONOLOGICAL STATEMENT OF CONSTITUTIONS AND STATUTES CITED.

The people of Georgia, in convention assembled, March 11th, 1868, adopted a Constitution.

By proclamation from the President of the United States, July 27th, 1868, it was made known that the State of Georgia, through its legislature, had on July 21st, 1868, ratified the 14th Article of the Constitution of the United States.

Thereafter, the Act of Congress relating to the State of Georgia, approved July 15th, 1870, was passed, which enacted—That the State, having complied with the reconstruction acts and ratified the 14th and 15th Articles of Amendment to the Constitution of the United States, was entitled to representation in the Congress of the United States.

Article VI of this Constitution, Code 1873, Sec. 5132 and 5134, ordains as follows:

"SEC. 1. The General Assembly, at its first session after the adoption of this Constitution, shall provide a thorough system of *general education* to be forever free to all children of the state, the expense of which shall be provided for by taxation, or otherwise.

"SEC. 3. The poll tax allowed by this Constitution, any educational fund now belonging to this state—except the endowment of, and debt due to the State University—or that may hereafter be obtained in any way, a special tax on shows and exhibitions, and on the sale of spirituous and malt liquors—which the General Assembly is hereby authorized to assess—and the proceeds from the commutation for militia service, are hereby set apart and devoted to the support of common schools. And if the provision herein made shall at any time prove insufficient, the General Assembly shall have power to levy such general tax upon the property of the state as may be necessary for the support of said school system. And there shall be established, as soon as practicable, one or more *common schools* in each school district in this state."

Thereafter, by Act of October 13th, 1870, (Public Laws 49) there was established a system of public instruction, which was repealed by Act approved August 23rd, 1872, (Public Laws 64), to perfect the public school system and to supersede existing school laws.

There was also approved August 23, 1872, P. L. 456, an Act to regulate public instruction in the County of Richmond, the material portions of which are as follows:

"SEC 9. And be it further enacted, That the County Board of "Education, *under the advice and assistance of the trustees in each "ward or school district*, shall make all necessary arrangements for "the instruction of the white and colored youth in separate schools; "they shall provide the same facilities for each, both as regards

"school-houses and fixtures, attainments and abilities of teachers, "length of term time, and all other matters appertaining to educa- "tion, but in no case shall white and colored children be taught to- "gether in the same school."

"SEC. 10. And be it further enacted, That the County Board of "Education may establish schools of *higher grade*, at such points "in the county as the interests and convenience of the people may "require, which school shall be under the *special management of "the board at large*, who shall have full power, in respect to such "schools, to employ, pay, and dismiss teachers, to build, repair and "furnish the school-house or houses, purchase or lease sites therefor "or rent suitable rooms, and make all other necessary provisions "relative to such schools as they may deem proper; the funds for "such purpose shall be deducted ratably from the quota apportioned "to the respective school districts."

"SEC. 16. And be it further enacted, That at their first meeting in "January of each year, or as soon thereafter as practicable, the "county board, by a two-thirds vote of all its members, shall levy "such tax as they may deem necessary for public school purposes; "it shall be the duty of the County Commissioner to make out an "assessment and return of such tax against all the legal tax-payers "in the county, and furnish a copy of said assessment and return to "the County Tax Collector, whose duty it shall be to collect the said "tax, and deposit it to the credit of the county board, in such bank "in the city of Augusta as may be designated by the State Com- "missioner for the deposit of the county school fund."

SEC. 19. And be it further enacted, That admissions to all the "*public schools*, of the county shall be *gratuitous* to minors, between "the ages of six and eighteen years, who are the children, wards or "apprentices of actual residents in Richmond county: Provided, "That the county board shall have power to admit to such public "schools other pupils, upon such terms, or the payment of such tui- "tion, as the Board may prescribe."

"SEC. 20. And be it further enacted, That no general law upon "the subject of education, now in force in this State, or hereafter to "be enacted by its General Assembly, shall be construed as to inter- "fere with, diminish or supersede the rights, powers and privileges "conferred upon the Board of Education of Richmond county by "this Act, unless it shall be so expressly provided by designating "the said county and board under their respective names."

Subsequently a new Constitution went into operation, December 21, 1877, Civil Code of '95 p. 1783, which ordained, Article 8, Section 1, Paragraph 1, Code 5906: There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation or otherwise. The Schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.

SEC. 5, Paragraph 1, Code 5910: Existing local school systems shall not be affected by this Constitution. Nothing contained in the first section of this article shall be construed to deprive schools in this state, not common schools, from participating in the educational fund of the state as to all pupils therein taught in the elementary branches of an English education.

By Act approved February 22, 1877, P. L. 347, Section 10 of the Act approved August 23, 1872, was amended to read as follows:

"And be it further enacted, That the County Board of Education "may establish schools of higher grade at such points in the county

"as the interest and convenience of the people may require, which "schools shall be under the special management of the Board at "large, who shall have full power in respect to such schools to em- "ploy, pay and dismiss teachers, to build, repair and furnish the "school-house or houses, purchase or lease sites therefor, or rent "suitable rooms, and make all other necessary provisions relative to "such schools as they may deem proper. The funds for such pur- "pose shall be deducted ratably from the quota apportioned to the "respective school districts, and the *County Board of Education* "*shall have full power and authority to charge such sums for tuition,* "*and incidental expenses, in said schools of higher grade, as the* "*Board from time to time, may fix and determine.*"

This Act was held Constitutional by the Supreme Court of the State in *Smith et al. vs. Bohler*, 72 Ga., 546, and affirmed in *Montgomery-Executor vs. The County Board of Education of Richmond County et al.*, 74 Ga., 41.

BRIEF OF THE ARGUMENT.

POINTS OF LAW.

THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THIS WRIT OF ERROR.

(a). There is a want of proper Parties. One prayer in the original petition, and reaffirmed in the amended petition, Printed Record 4 and 21, was that the Tax Collector be enjoined from collecting so much of the tax levy of July 10th 1897, as had been levied for the support by said board in said county of said systemof high schools.

The Tax Collector, at the hearing of the rule against him, demurred and plead, as to any such procedure, against him, "res adjudicata", citing 72 Ga. Reports, page 546.

The Court below, Printed Record 38, sustained the demurrer and refused the prayer of the plaintiffs petition, but the petition was not dismissed as to him until after the decision of the Supreme Court, page 38, P. R. when all relief was refused.

The Tax Collector being a party to the original petition and the writ of error to the Supreme Court of Georgia and duly served, Supplemental Record, page 2, he should have been a party to this writ of error to be bound thereby.

The procedure was to enjoin the collection by the Tax Collector of taxes assessed and to be collected for 1897. No other year was at issue or involved in the procedure. Since the rendition of the decision dismissing the bill, all these taxes have been in conformity to law paid out and disbursed. The Tax Collector not being a party before this Court there is no way to make the judgment of the Court applicable to him or reach the taxes assessed.

(b) The final decree of Richmond Superior Court, Record 39, Par. 2, was that the plaintiffs in the cause, "be and they are hereby refused all the relief prayed for," and the petition be dismissed at their costs. The final decision on the merits specifies no particular ground. Therefore it does not affirmatively appear that a Federal question was presented, and that the judgment as rendered could not have been given without deciding it, which is necessary.

Harrison vs. Morton, 171 U. S., 38.

(c) It was an application to a Court of Equity to restrain by injunction the exercise by the respective trustees comprising the Board, of the privileges of their office, which is prohibited.

White vs. Berry, 171 U. S., 366.

(d) It really rested upon grounds other than those dependent upon a Federal question, and is not reviewable, although a Federal question was originally sought to be raised in the State Court.

Chappell Chemical & Fertilizer Co. vs. Sulphur Mines Co. of Virginia, 172 U. S., 474. 101 U. S. 22; 120 U. S. 68.

To the same effect see McQuade vs. inhabitants of the City of Trenton, 172 U. S., 636, in which the Court cites in support of it, 142 U. S., 254; 113 U. S., 574; 116 U. S., 410; 171 U. S., 38, and 163 U. S., 207.

(e) Regulation by a Board of Education of schools of higher grade than free schools abridges no privileges or immunity of a citizen of the United States or denies him the equal protection of the laws.

Slaughterhouse cases, 16 Wal., 81.

FIRST ASSIGNMENT OF ERROR, PRINTED RECORD 40.

The language of the statute of Georgia referred to, acts of '72, P. L., 460, is, *May establish schools of higher grade at such points in the County as the interest amd convenience of the people may require—and may make all other necessary provisions relating to such schools as they may deem proper.*

This Act is now assigned as contrary to the Constitution, especially the 14th amendment, in that it gives a *discretion* to the Board to establish and maintain, and to discontinue and refuse to maintain, high schools for persons of the negro race. This question that the statute was unconstitutional because of discretion given, was not made in either the Superior or the Supreme Court of Georgia. The latter, in its opinion, P. R., 57, say that this point, violation of Constitution U. S., was not argued before them by the learned counsel for the defendant in error, either orally or by brief, the only mention of it in his brief being at the conclusion, where he states the denial is to violate not only the State law but the Constitution of the United States—fourteenth amendment, citing no other authority to sustain the contention;

neither did he point out in the brief which paragraph of the 14th amendment was violated.

The decision below, Record 35, was based upon the construction of a State Statute, was never excepted to by the plaintiffs and what is said by the Supreme Court on this question is as to the claim in the petition, Record, 57, in violation *of the Constitution of Georgia and the United States.*

The Judge of the Superior Court in his decision, page 36 of the Printed Record, held that the establishment and maintenance of schools of higher grades than common schools, authorized by section ten of the Act, was a matter that rests exclusively in the sound discretion of the Board, but if the discretion is exercised in the establishment or maintenance of schools of higher grade they must be established and maintained in harmony and in compliance with section nine of the said Act, and the Board must provide the same facilities for higher education for both races.

The Supreme Court of the State, reviewing this decision, held, Printed Record, page 55, "That discretion is a power conferred upon "them by law of acting officially under certain circumstances accord- "ing to their own judgment and conscience, not controlled by the "judgment or conscience of others. The powers conferred are legisla- "tive in their character."

And on page 56 say: We think the Board were "not required to "establish a high school for negroes whenever they established one for "whites * * We do not mean to intimate that any public corporation of "this kind can arbitrarily and without reason establish one school and "suspend another, but where it is in its discretion to pass upon facts "and determine from the best interests of the people at large, courts "will not control its discretion unless it is manifestly abused, although "the Court may be of the opinion that the corporation erred upon the "facts," holding also that the 9th section of the Act related entirely to common schools and not to the matter of high schools, and that the 10th section related to separate and independent schools from those established under the 9th section, which were not to be free schools, but pupils were required to pay tuition. *Such a school is therefore "not a free high school."*

In Atchison, Topeka & Sante Fe R. R. vs. Matthews & Trudell, decided Arpil 17 1899. 174 U. S. Reports, 96, this Court held the statuteof Kansas, putting upon railroad companies the burden of proof where damages by fire had been caused by operating the railroad, was not in violation of the 14th amendment, as this amendment did not forbid classification—that "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public * * * Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In the same case the Court say: "All questions of fact are settled by the decision of the state courts. (Hedrick vs. Atchison, T. & S. F. R. R. Co., 167 U. S., 673, 677. and cases cited in the opinion), and the single matter for our consideration is the constitutionality of

this statute."—As in this case at bar the constitutionality of a delegation of discretion by the statute.

In Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 295, this Court, affirming the previous rulings in 134 U. S., 232 and 148 U. S., 657, say that the 14th amendment was not intended to compel the state to adopt an iron rule of equal taxation. "There is therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

SECOND ASSIGNMENT OF ERROR, PRINTED RECORD 41.

There was no such finding of the Court below as set out in the language of this assignment. The right to the equal protection of the laws is not denied by a state court when it is apparent that the same law and course of procedure would be applied to any other person in the state under similar circumstances and conditions.

Tinley vs. Anderson, 171 U. S. Reports, 101.

The "due process of law," and which was the proper remedy open to the plaintiffs, was to have the decision of the Board of Education reviewed by writ of certiorari by the State Commissioner, which was not resorted to, and the time to sue out the same allowed to expire without any resort thereto.

In Dewy vs. DesMoines, 173 U. S., 198, the Court say: Parties are not confined here to the same arguments which were advanced in the Court below upon a Federal question there discussed. Having, however, raised only one Federal question in the Court below, can a party come into this Court from a State Court and argue the question thus raised, and also another not connected with it and which was not raised in any of the Courts below and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised?" Here the assignment claims violation of the Constitution as a whole without specification which is not a sufficient compliance with the rule.

THIRD ASSIGNMENT OF ERROR, PRINTED RECORD 41.

This assignment, that the Court decided that negroes could consistently with the Constitution of the United States be by the laws of Georgia taxed and the money derived therefrom appropriated to the establishment and maintenance of high schools for white persons, while pursuant to the same law said Board at the same time refused to establish and maintain high schools for the education of persons of the negro race, does not specify the particular portion of the Constitution of the United States which is violated, nor the true decision rendered. To understand the error in the sssignment, reference is made to the facts.

1st. The educational tax for 1897 arose from the tax levy of the state, poll tax of the County of Richmond, and the State Educational Fund

tax, to which was added the tax imposed by the Board of Education itself and required of the tax collector, P. R. 9, of $45,000.00. The proportion of the amount assessed for the colored schools was far in excess of the entire tax upon the colored population. These plaintiffs in error, see affidavit of the Tax collector P. R. 33, had assessed against them as a whole $23.17, of which amount, according to the averments in their petition, ten per cent. to-wit: $2.31, was appropriated to the "system of high schools."

2nd. In their answer the Board say, P. R. 12, that in their view, until the local trustees—i. e., the city conference board—should have furnished a sufficiency of primary schools for the colored population it would be unwise and unconscionable to keep up a high school for sixty pupils and turn away three hundred little negroes who are asking to be taught their alphabet and to read and write. That no part of the funds of this board accrued or accruing, and no property appropriated to the education of the negro race, has been taken from them. This Board has only applied the same means and moneys from one grade of their education to another; and in this connection says that the enrollment in the colored school in this year is 238 more than last, the Ware High School building accommodating 188 pupils.

So, in fact, there was no appropriation of the tax assessed on the colored people under this law to the support of white high schools, but all of it was applied in the discretion of the Board by adding it to what had been appropriated for primary education of the negro race and increasing the number of pupils.

FOURTH ASSIGNMENT OF ERROR, PRINTED RECORD 41.

That the Court erred in dismissing the complaint of the plaintiffs in error.

If this is a proper assignment of error (which is denied), it opens to the Court the whole case, which I proceed to discuss.

THE CONSTITUTION OF THE UNITED STATES.

1. Plaintiffs originally based their application for relief by injunction on the fourteenth amendment of the Constitution of the United States, which, among other things, provides: "*No State* shall make or enforce any law which shall abridge *the privileges or immunities of the citizens of the United States;* nor shall *any State* deprive any person of life, liberty or property, without due process of law, nor *deny to any person* within its jurisdiction the equal protection of the laws." This language of the Constitution does not confer any power on the Congress except to correct any illegal state action. Congress can pass no affirmative legislation in reference to negroes thereunder. It is solely a prohibition on the power of the state.

163 U. S., 543-4, 549, 551. Plessy's case.
109 U. S., 3, 10, 13. Civil right cases.
16 Wallace, 36. Slaughter House cases.

The meaning of the Fourteenth Amendment of the Constitution of the United States is thus explained in the following cases:

Plessy's case, in 163 U. S., 537, arose relative to an Act of Louisiana requiring railroads to provide equal but separate accommodations for white and colored on their cars. In this case it was held that the conductors could eject a negro and he could be jailed for riding in a car reserved for white persons, and that this law was not in conflict with the Thirteenth and Fourteenth amendments of the Constitution. The Court say, speaking of this amendment (163 U. S., 543, citing the Slaughter House cases, 16 Wallace, 36): "It's main purpose was to establish the citizenship of the negro and to give definition of citizenship of the United States and of the states, and to protect from the hostile legislation of the states *the privileges* and immunities of *citizens* of the United States, *as distinguished from those of citizens of the states,*" (page 544). "The object of the amendment was undoubtedly to enforce the *absolute equality* of the *two races before the law*, but in the nature of things it could not have been intended *to abolish distinctions based upon color*, or *to enforce social* as distinguished from political equality, or a comingling of the two races upon terms unsatisfactory to either." Therefore laws have been enacted providing for the support of separate schools for white and colored children, and forbidding intermarriage between the races, &c.

Again, on page 546, in "The Civil Rights Cases," 109 U. S., 3, above cited, it was held an Act of Congress entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, etc., of inns, theatres, etc., "and made applicable to citizens of every race and color regardless of any previous condition of servitude," was *unconstitutional and void*, upon the ground that the Fourteenth amendment was prohibitory *upon the states only*, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the states were prohibited from making or enforcing certain laws or doing certain acts, *but corrective legislation*, such as might be necessary or proper for counteracting and redressing the effects of such laws or acts. In delivering the opinion of the Court, Mr. Justice Bradley observed, "That the Fourteenth amendment does not invest Congress with power to legislate on subjects that are within the domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to."

In 93rd New York, 435, *People vs. Gallager*, *mandamus*, was applied for to compel the principal of a public school to admit a negro pupil, and the Court held he was not entitled to the *mandamus*, as there was another school he could attend. In construing the Fourteenth Amendment the Court say: "In speaking of the *privileges and immu-*
"*nities* which the state is forbidden to deny the citizens, they are
"referred to as the *privileges and immunities* which belong to them as
"*citizens of the United States.* It has been argued from this language
"that such rights and privileges as are granted to its citizens, *and de-*
"*pend solely upon the laws of the State for their origin and support, are not*
"*within the constitutional inhibition*, and may lawfully be denied to any
"class or race by the states at their will and discretion. This construc-
"tion is distinctly and plainly held in the Slaughter House cases (16

"Wall, 36), by the Supreme Court of the United States. The doctrine "of that case has not, to our knowledge been retracted or questioned by "any of its subsequent decisions.

"It would seem to be a plain deduction from the rule in that case that "the privilege of receiving an education at the expense of the state, "being created and conferred solely by the laws of the state, and always "subject to its *discretionary regulation* might be *granted or refused to any "individual* or class at the pleasure of the state. This view of the "question is also taken in State, ex rel.. Garnes vs. McCann, (21 Ohio "St., 210), and Cory vs. Carter (48 Ind., 337; 17 Am. Rep., 738). The "judgment appealed from might, therefore, very well be affirmed upon "the authority of these cases."

This last decision of the Supreme Court, 163rd U. S., 550, leaves the states with the power to reasonably regulate the negro in the enjoyment of his civil and social rights in accordance with tradition and custom, and unless his rights are greatly abused, he has no cause of complaint. The state need not provide for *his education* unless it sees fit.

The fundamental mistake of the Plaintiff's in this case is in supposing that the Fourteenth Amendment of the Constitution of the United States controls this case, and that *equal protection* of the laws mean *equal privileges.* The contrary to this principle is shown in three cases cited In *exparte Kenny,* 3rd Hughes, 16, the matter is logically discussed.

The Fourteenth Amendment of the Constitution of the United States provides that no state shall make or enforce any law which shall abridge the *privileges of citizens of the United States,* nor deny to any person within its jurisdiction the equal protection of the laws. The only *privileges* guaranteed by this section are those of persons who are citizens of the United States: "No state shall abridge the privileges of citizens of the United States. Privileges of citizens of the United States are those protected by this amendment, and they are the only privileges that are protected. The *equal protection of the laws* is guaranteed "to any person within its jurisdiction," that is the jurisdiction of the state. There is a difference between citizens of the United States and citizens of states. The rights which a person has as a citizen of the United States, are such that he has by virtue of his state being a member of the American Union under the provision of our national Constitution." As for example, "a citizen of Virginia is allowed by "her laws to carry on business by paying a certain tax, a citizen of "Maryland who comes into Virginia and pay the same tax is entitled "under the national Constitution, to carry on the same business in Vir-"ginia." The Virginian carries on business in his state by right of his *state citizenship.* The Marylander carries on business in Virginia by right of his *national citizenship.*

The amendment further provides that no state shall "deny to any per-"son within its jurisdiction the equal protection of the laws." "Here is "a distinction between citizens of the United States and "*any person,*" "whether citizen or alien, residing or "happening to be within the "borders of a state. The *declaratory* clause forbids any abridgment of the "rights of citizens of the United States." The *remedial* clause gives "equal "protection to all persons whatever while within a state's borders.

"The amendment does not provide that the *privileges shall be equal*, but "it does provide that *protection shall be equal*. It establishes equality "between all persons in their *right to protection*, but does not confer "*equality in the privileges they are to enjoy*. It provides that whatever "privileges the Constitution and laws of the United States confer upon "a citizen as a citizen of the United States shall be enjoyed without "abridgement; and it provides that all persons within a state, whether "a citizen of the United States, or of the states, or aliens, shall be "equally protected by the laws in whatever privileges, whether equal "or not equal, they may have from the United States or from the "state. However *unequal their privileges* respectively, yet a foreigner, "a citizen of another American state, and a citizen of the state, shall "have the benefit equally in the state of all remedial laws for the re- "covery of rights and of all legal safe-guards ordained for the protec- "tion of life, liberty and property.

"I think it plain from this review, that an *equality of privileges* is not "enforced by the Constitution upon a state *in respect to its domestic laws* "for the government of its own citizens as such, while they are within "its jurisdiction."

Therefore, whether a state will educate its citizens or not, is a question with which the United States Constitution has nothing to do. It is a matter of purely domestic concern an internal police regulation. If the state does not see fit to educate its citizens, Congress cannot compel it under the Constitution, but if the states determine to give educational facilities to its citizens, it is in its province to do so in the exercise of its police power.

113 U. S., 27–31; 135 U. S., 131; 136 U. S., 436–449; 140 U. S., 555.

In *Giozza vs. Tierman*, 148 U. S., 662, the Supreme Court say, speaking of the Fourteenth Amendment: "The amendment does not take "from the states these powers of police that *were reserved* at the time "the original Constitution was adopted. Undoubtedly it forbids any "arbitrary deprivation of life, liberty or property, and secures equal "protection to all under like circumstances in the enjoyment of their "rights; but it was not designed to interfere with the power of the "state to protect the lives, liberty and property of its citizens, and to "promote their health, morals, *education* and good order." Citing:

Barbier vs. Connelly, 113 U. S., 27–31. *In re* Kemler, 136 U. S., 436.

THE SCHOOLS.

1. The question in this case is how has the state acted? The Act of 1872 and amendments established the County Board of Education. This Act provides for regulation of public instruction in Richmond County. The establishment of district schools, under the control of the district trustees, (Section 6, *was mandatory*. These trustees *were required* to erect schools. Their kind was not designated in the Act, but they were to be for the district. Whatever they were, *equal facilities* in these schools were to be given to the whites and blacks, and the schools were to be separate for both races. Under this Act the district trustees have established what are known as primary

schools, wherein the elementary branches of an English education were taught. And this was but a repitition of the general state policy. See Act 1872, pg. 66.

By Section 10 of the Act the *whole County Board may* establish schools of higher grade at such points in the county as the interest and convenience of the people may require. Over these higher schools the whole Board acts for all the people "with full power." The Board is elected by the people, and any improper action by the Board can be corrected at the voting polls. Proper men can be returned as members of the Board.

These schools, when established by the Board, are to be partly supported by contributions from the taxes of the several districts, and by tuition under Act of 1877. The State has, therefore, promised a common school education. *That much is free.* She permits higher schools to be established—if the Board, the representatives of the people, wish it. The Board "may establish," *and pupils pay* for tuition. It is not a free public high school. The want of or necessity for such school is to be determined by the Board.

Under this power high schools have in the past been established, and have been discontinued at the discretion or legislative will of the Board, as the public need or wants required. The Tubman High School for white girls has been established, which is maintained by aid from the Board and the tuition paid by pupils, $15 a year. The Ware High School for negro boys and girls was established, $10 per annum, and has been temporarily discontinued. The question is, *can its re-establishment be compelled?*

The Board is a legislature for the purpose of determining this question. The legislative power on the subject of education is under the Act of 1872 delegated by the Legislature to the whole County Board of Education. It can act or not as it sees best. Such a delegation of power is legal (71 Ga., 856; 72 Ga., 554; 73 Ga., 604; 78 Ga., 672; 70 Ga., 694.) The power to establish is necessarily legislative in its character. To declare what shall be in the future is essentially a legislative power (19 Am. E. C. L., 391.) The power to establish includes the power to vacate and annull (44 Ga., 465; 51 Ga., 227; 22 Ga., 535). From legislative action there is no appeal, except to enlightened public opinion. Ib., 118 U. S., 370.

The Courts will not interfere. 72 Ga., 353 (c), 358, bottom, 554; 52 Ga., 212; 50 Ga., 179; 19 Ga., 471; 43 Ga., 67.

The establishment of discontinuance of a school being legislative is a matter entirely within the discretion of the Board, and as the Board is not distinctly required to establish a system of high schools, and has not done so, they cannot be compelled to exercise their legislative power. Cases *supra* and Mobile School Commissioners vs. Putnam, 44 Ala., 506-537, cited from 13 Am. E. C. L., 223, bottom, 54 Ga., 426; 75 Ga., 433; 72 Ga., 553; 17 Ga., 56 (4)-612; 19 Ga., 471; 19 Am. E. C. L., 463; 118 U. S., 370). As the Board are not required to establish a high school system or a single high school, it cannot be compelled to exercise

their legislative power to re-establish one high school for negro boys and girls where there is no sufficient reason therefor. No system of high schools has been established as the wants of the community never required it.

The Board has never established a free high school. It cannot establish such, because the direction of the legislature to charge tuition is practically a limitation on the power to make a free school, and such a legislative act is equivalent to saying there shall be no purely free high school, only the district and primary schools are free. The petitioners ask the establishment of a school for boys and girls when this Board does not maintain anything but a high school for white girls, and that because the property was given for that purpose. The power to charge tuition, was by Act of 1877, p. 347, passed in February, prior to the Constitution of Dec. 21, 1877, and the cases in 27 S. E. R., 710; 96 Ga., 477 and 86 Ga., 605, have no application—They are based on action under the Constitution of 1877. Defendant has never had a *free high school.*

Defendant therefore cannot be compelled to establish a free public high school for negro boys and girls.

(a). The state has not put the imperative or mandatory duty on defendant to do so.

(b). By directing tuition to be charged, the State has forbidden the establishment of free high Schools in Richmond county.

(c). It has not established a high school for white boys and girls.

DISCRETION OF THE BOARD.

No imperitave duty being put on the Board, there is no breach of duty for petitioners to complain of, nothing to compel the Board to do.

The Tubman building was given for a high school, and for such the Board accepted it.

The plaintiffs do not offer defendant a school building, and ask defendant to establish a negro girl school therein. They ask the re-establishment of a school for negro boys and girls, which the whites do not have. Until they donate a proper building and the Board refuses, they are not in a position *to complain of a want of equality and identity of benefits*, and defendant can establish a white high school solely.

In Chrisman vs. Brookhaven, 12 Southern Reporter, 458, the Supreme Court of Mississippi, Jan. 30, 1893, say :

"1. The constitutional provision requiring the legislature to estab-
" lish and maintain a uniform system of free public schools *does not pre-*
" *vent its providing* for the establishment outside of that system of *a school*
" *exclusively for whites*, and the issue of bonds by the town in which it is
" located to pay therefor.

"2. The constitutional provision for equal and uniform taxation does
" not prevent local taxation for local purposes and benefits.

"3. Const. 1869, art. 1, §21, with its proviso inhibiting any distinc-
" tion among citizens, does not prevent legislation making separate
" provision from the different races in the matter of schools."

The Act of 1872, Section 10, leaves the establishment of high schools entirely to the discretion of the Board, not compulsory; nor are *equal*

facilities in high schools required to be given under the 10th section. The Board is simply to meet the public wants as far as it can do so. The high schools under §10 are permissive and are outside the public primary school system—no part thereof—the primary are *free*, the high schools are *pay*, and attendance voluntary.

The question of financial distribution of taxes must be left somewhere. The law has given that to the County Board, with legislative power. Petitioners have not :

(a). Shown *any inequality in the law itself*, which is what the Constitution forbids (see Strauder vs. West Virginia, 100 U. S., 303, head note 5); 163 U. S., 543-4; 93 N. Y., 447.

(b). Nor that by any action of the Board have they been denied any *equal protection*. 3rd Hughes, 16.

(c.) No taxes have been levied or collected exclusively for *high schools*. The levy made is the same as was approved by S. C. Ga., in 72 Ga., 554; 74 Ga., 43, as to this Board.

The *regulation of education*, like the regulation of public health, morals, &c., &c., is governed by the police power of the state, and not by the Fourteenth Amendment of the Constitution.

Barbier vs. Connelly, 113 U. S., 27-31.
Leisy vs. Hardin, 135 U. S., 131.
Giozza vs. Tienan, 148 U. S., 662.
In re Kemmler, 136 U. S., 436-449.
In re Rahrer, 140 U. S., 555.
Paupe, Ex., vs Seibert, 142 U. S., 354.
Cantini vs. Tilman, 54 Fed. Rep., 974.

Because the police power is among the *powers reserved to the States* at the time of the adoption of the Constitution, and not submitted to Congress or the General Government under the Constitution.

56th Fed. Rep., 356; 11th Peters, 102.
51st Fed. Rep., 788; 111th U. S., 747.
127th U. S., 678; 148 U. S., 662.
167 U. S., 47; 165 U. S., 182.

EQUAL PROTECTION.

This cannot mean *equal benefits* (*cases cited above*) or the Slaughter House cases would not have been decided as they were. There an exclusive privilege was given a corporation to slaughter animals in New Orleans. This was held by the Supreme Court to be a proper exercise of the police power, and *not unreasonable*, although it was a monoply. 16 Wallace, 36-62; 111 U. S., 746; 93rd N. Y., 447.

Nor authority to so regulate the beer trade, as *to destroy* a brewery. Mugler vs. Kansas, 123 U. S., 623-664.

The most extreme authority that gives any such views as that advanced by petitioners are the cases decided by Judge Barr in Kentucky. In Anderson vs. Louisville and Nashville Railroad, 62nd Fed. Rep., 48, he says:

"The Fourteenth Amendment to the Constitution of the United

"States *prohibits discrimination* by a state because of race or previous "condition of servitude, and, indeed, secures to all of its citizens "certain fundamental rights as against state action, but it does not "secure *the joint and common enjoyment of such rights.* It is the equality "of right which is secured, and not the joint and common enjoyment "of such right." Civil Rights Cases, 109 U. S., 3; 3 Sup., Ct., 18; U. S. "vs. Buntin, 10 Fed., 730; Claybrook vs. Owensboro, 16 Fed., 297.

In *Davenport vs. Cloverport*, 72 Fed. Rep., 694, Judge Barr, adopting 16 F. R. 302, says: "The equal protection of the laws guaranteed by " this amendment must and can only mean that *the laws of the state* " must be equal in their benefits, as well as in their burdens, and that " less would not be the equal protection of the laws. This does not " mean *absolute equality* in distributing the benefits of taxation. That " is impracticable. But it does mean the distribution of the benefits " upon some fair and equal classification or basis."

Judge Barr says: "This does not mean absolute equality in distributing the benefits of taxation—this is impracticable."

Yet this has been done for petitioners.

(a). The same money is spent now as was spent before, and more negroes taught.

(b). Other high school education is in the city and at same cost to them. Some of petitioners' children have gone there as they should have done. 10 Fed. R., 736. White boys go to a pay high school.

(c). The petitioners do not offer the Board a school house for a high school for negro boys and girls.

(d). The Board has not established such a school, i. e., for white boys and girls.

In *Reid vs. Eatonton*, 80 Ga., 756, the constitutionality of the Act of October 24th, 1887, (P. L., 839,) in reference to schools at Eatonton, was before the Court. This Act provided for bonds to be issued for the erection of white and colored schools, and in the distribution of the funds raised by the bonds, it was to be divided between the whites and negroes on the following basis (Section 2): "That in no event shall the "amount appropriated to each school exceed the *pro rata* part of the "taxes paid by the white and colored people of said city, as shown by "the tax digest of said city." A white taxpayer sought to enjoin the distribution, on the ground that it was unlawful discrimination against the negroes. It appeared that the negroes themselves, as a class, were not complaining, and this Court held that the white taxpayer had not sufficient interest to bring the suit, and said further: "Even if the com- "plainant had a right to file this bill, we are not prepared to hold that "the injunction should have been granted, or that the Act was uncon- "stitutional."

In the distribution from school taxes the negroes in Augusta receive over $17,000 more than what they—the negro race—pay in. Suppose they were allowed only what they pay in, as in the Eatonton case. The parties who are complaining do not show a sufficient interest to bring the suit, or that they represent the negroes as a class, or how they will be damaged by the continued payment of the taxes charged against

them, or that they themselves are being deprived of an education. 72 Ga., 553, (c).

Many inequalities in the execution of state laws exist, and are allowed, notwithstanding equal protection is the rule, such as:

(a). Venire not required to have negroes on list for trial before a petit jury, 100 U. S., 315 (7), 321; 107 U. S., 110. Nor on list grand jury, 162U. S., 580–566.

(b). No person allowed to speak on "Boston Common" in absence of permit from Mayor. Reasonable regulation, 167, U.S., 47; 165 U.S., 180-2.

(c). Woman and foreign residents not on jury. 100U.S., 335, 162U.S., 565

(d). No negro and white judge not required on bench. 100 U. S., 335.

(e). Citizens of a state can have privileges not given citizens of the United States, Slaughter House case. 16 Wall, 38; 3 Hughes, 16.

(f). No woman practicing law. 16 Wall, 130.

(g). Marriage between negroes and whites, not allowed. 39 Ga., 321; 163 U. S., 545; 3 Hughes, 16; 1 Wood R., 537; 3 Woods, 367.

(h). Negroes not allowed in Theatres, Inns, Cars, etc. 16 L. R. A., 560; 109 U. S., 3; 163 U. S., 544 and 550.

(i). Even a discrimination based on color is not illegal. In *Lehew vs. Brummel*, 15th S. W. Rep., 765, the Supreme Court of Missouri say speaking of the Fourteenth Amendment: "The common school system of this state is a creature of the State Constitution and the laws passed pursuant to its command. The *right of children* to attend the public schools is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the state, and a right belonging to a citizen of this state as such. We then come to the last clause, which is prohibitory of state action. It says: "Nor shall any state deny to any person within its jurisdiction equal protections of the laws." Speaking of this clause in its application to state legislation as to colored persons, Justice Strong said: "What is this but declaring that *the law* in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and, in regard to the colored race for whose protection the amendment was primarily designed, that *no discrimination* shall be made against them by law *because of their color*?" *Strauder vs. West Virginia*, 100 *U. S.*, 303. We then come to the simple question whether our Constitution and the Statutes passed pursuant to it requiring persons to attend schools established and maintained at public expense for the education of colored persons only, deny to such persons "equal protection of the laws." It is to be observed, in the first place, that these persons are not denied the advantages of the public schools. The right to attend such schools and receive instruction thereat, it is guaranteed to them."

But it will be said the classification now in question is one *based on color*, and so it is; but the color carries with it natural race peculiarities, which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences created different social relations, recognized by all well organized governments. If we cast aside chimercial theories and look to practical results, it seems to us it must be conceded that separate schools for

colored children is a regulation to their great advantage. It is true, Brummell's children must go three and one half miles to reach a colored school, while no white child in the district is required to go further than two miles. The distance which these children must go to reach a colored school is a matter of inconvenience which must arise in any school system. *The law does* not undertake to establish a school within a given distance of any one, white or black. The *inequality in distances* to be traveled by the children of different families is but an incident to any Classification, and furnishes no substantial ground of complaint.

Equality of protection of the law is never determined on the color line. No line can be drawn in public institutions between citizens, on *the color idea*. If color can determine, then equality would mean *equal* number of negroes and whites in all matters—such as juries—6 to 6. City Council. Judges of one negro, one white, etc., etc. *No, the color line* is a fundamental error to illustrate equality of protection under the Constitution. See 16 Federal Reporter, 301; 100 U. S., 314–335; 163 U. S., 544–551. Otherwise "white men's houses painted white—negroes painted black," &c., &c., 163 U. S., 549.

A person may be equally protected and received no benefits. Read 100 U. S., at 335; 163 U. S., 550.

DISTINCTION BASED ON COLOR.

While discrimination *in the law* on account of *race and color* is forbidden. 162 U. S., 580. Yet say the Supreme Court, the Fourteenth Amendment to the U. S. Constitution "could not have intended to "abolish *distinctions based on color*." 163 U. S., 544 top, 551 bottom. They arise from nature. 15 S. W. R., 765 or 766.

While equality of legal rights is what is protected, yet this does not mean *identity* of *benefits*, nor *joint and common* enjoyment of benefits of school funds from taxation. 62 Fed. R. 48; 72 Fed. R., 694; 3 Hughes, 16. Equal protection does mean *equal privilege*. 3 Hughes, 16; 100 U. S., 335 middle; 163 U. S., 550.

When there is no discrimination against *the negro race* in the law itself on account of color, or previous condition of servitude, it is then a question whether the administration of the law *is reasonable*, and "in determining this question of reasonableness (the "state authority) is at liberty to act with reference to the established "*usages, customs and traditions* of the people," etc. 163 U. S., 550 bottom; 100 U. S., 321, 335. General Act 1872, pp. 69. If the action excluding the negro be based on any conditions other than because of his color, or race—then the constitutional amendment has no application. Reasonable action towards the negroes has been had here. Those desiring a high school education, which the state *has not promised should be free*, and which has never been free, and for which the County Board charged $10 each, when the Ware High School existed—can now go to other equally accessible high schools at $8 a year—which schools did not exist when the Ware High School was opened. The evidence is that children of petitioners have now gone to these schools.

CONCLUSION.

In the Slaughter House Cases, 16 Wall, 81, this Court say, as to a claim of unconstitutionality of an Act of the legislature of the state of Louisiana, that the construction claimed by the plaintiffs in error "would constitute this Court a perpetual censor upon all legislation of the state, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with these rights as they existed at the time of the adoption of this amendment," and when speaking of the fourteenth amendment say, "We doubt very much whether any action of the state, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

In the case of the Texas & Pacific Ry. Co. vs. The Inter-State Com. Commission, 162 U. S., pp. 199 and 238, this Court say, "The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all the facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was." And in the syllabus of the case, p. 199, say, "The mere fact that * * * disparity between through and local rates was considerable, did not warrant the Court in finding that such disparity constitutes any undue discrimination."

No evil eye or combination is averred or shown against the Board of Education, and the worst charge that can be brought against it is an error of judgment in applying the money raised by taxation, from a high school for the blacks to a primary school for the blacks.

The evidence clearly established the necessity for this course, but petitioners insisting on re-establishing high schools brought this case to *enjoin the operation* of all the high schools; also a separate suit by mandamus to compel a re-establishment of the school. Both cases were decided against them by the Supreme Court of Georgia. 103 Ga, Reports, 641, 105 Ga. Reports, 463. Error is assigned here only to the decision in the injunction case, 103 Ga. Reports, 641. The highest tribunal in the State of Georgia having construed the 10th section of the Act of 1872, and sustained the action of the Board as a wise and judicious exercise of its legislative discretion which could not be interferred with, this Court is respectfully asked to affirm the judgment.

Frank H. Miller.

Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 164.

J. W. CUMMING, et al.

vs.

THE BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA.

ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, GEORGIA.

STATEMENT.

The return shows:

The Board, which under the Act of 1872, had been organized since January, 1873, had never established any *system* of pay High Schools—conceiving that it was neither made its duty nor had it authority to establish such system. Its power in this regard was limited to establishing such pay High Schools in the county as the interest and convenience of the people may require. Act 1872, Sec. 10, p. 460.

In pursuance of this authority, this Board has always exercised the power of establishing and suspending and abolishing pay High Schools, according to its means, and as in its deliberative and judicial discretion, the interest and wants of the people might require. At one time and another it has had five High Schools, to wit: A boy High Schoool at the Richmond Academy, the Tubman High School for girls, the Hephzibah High School for boys and girls, and the Summerville High School for boys and girls, and the Ware High School for colored boys and girls.

The school in Summerville was abolished June 1, 1878, when the trustees of the Summerville Academy received the income of a fund devised under the will of William Robertson for the support of teachers in that village. The trustees of the Richmond Academy having resumed full control of that institution (July 1, 1878) the high school under this Board was discontinued and never re-established.

In pursuance of the authority delegated to the Board by the 10th Section of Act of 1872, p. , the Board, on the day of , established the Tubman High School in the city of Augusta. The late Mrs. Emily H. Tubman, having presented to the Board a large lot and building for the purpose of affording a higher education to the young women of the county, and the Richmond Academy affording this advantage and benefit to the male sex, this Board deemed it wise and proper, and responsive to the public want, to institute this school, each pupil from the county to be charged $15 per annum, non-residents to pay $20, these being the sums charged by the Richmond Academy for boys.

The property was donated upon express condition that in the event the Board should fail to use the Academy for a high school the same was to enure instantly to the Richmond Academy and Augusta Free School. The value of this property, with fixtures, is now not less than $30,000.

Thereafter, in 1876, the Board thought it expedient and proper to give its assistance to the Hephzibah High School, being a school conducted and controlled by the Hephzibah Baptist Association, in the village to Hephzibah, in the southeastern portion of the county, charging for each pupil the sum of $15 per annum.

Thereafter, in 1880, there being no high school for the colored race, and the funds of this defendant justifying it, and other schools of lower grades being established by the local trustees in the city of Augusta, sufficient to accommodate the colored children, the Board deemed it wise and proper to establish the Ware High School, charging for each pupil taught therein ten dollars per annum.

At a meeting of the Board in June, 1888, a special committee was appointed to investigate the status of the high schools with instructions to report to the July meeting of the Board, and submit such recommendations as in its judgment might be proper and necessary.

This committee held divers meetings and made a thorough investigotion as instructed, and duly reported to the July meeting.

Touching the Ware High School, its friends and the colored patrons thereof were called before the committee, and were heard by the committee with every respect and consideration. They were told the reasons which controlled the committee in its intention to recommend the discontinuance of the school. These reasons were: Because four hundred or more negro children were being turned away from the schools of primary grade, unable to be provided with seats and teachers. Because the same means and the same buildings which were used to accomodate sixty pupils of high school grade, would accomodate two hundred pupils in the rudiments of education. Because the Board, at this time were not financially able to erect buildings and employ additional teachers for the large numbers of colored children, who were in need of primary education. And because there were in the city of Augusta at this time, three colored public high schools, to wit:

The Haines' Industrial School (Presbyterian), had an income of $3,500. The Walker Baptist Institute (Baptist), an income of $2,598. The Payne Institute (Methodist), an income of $7,344. (Total $13,442).

The reports of the committee were as follows:

REPORT OF COMMITTEE ON TUBMAN HIGH SCHOOL.

AUGUSTA, GA., July 10th, 1897.

To the Board of Education:

The Committee appointed to investigate the condition of the High Schools and to make such recommendations as they deem wise, beg leave to make the following report on the Tubman High School:

This building is the generous gift of Mrs. Emily Tubman made to the Board of Education over twenty years ago for the purpose of af-

fording an higher education to the young ladies of our city. The building has been very much enlarged and improved at the expense of the Board. The school has grown in numbers every year until now about 200 pupils are on the roll. Mr. John Neely is the principal of the school and is assisted by Miss Mary A. Coffin, Miss A. B. Coffin, Miss Zoe Barclay, Miss Elizabeth Vannerson; in addition there is a department of French by Madame Esmery, of Stenography and Typewriting by Miss DeHay. Music and Penmanship are taught in the School by the regular directors of those branches of the City Schools.

It is not amiss for your Committee to say that they recognize the necessity of a High School for girls to be operated by the Board of Education, because there is no other sufficient institution of this kind in the city. The Richmond Academy in our city is a High School where the boys of our schools can attend. There are High Schools for the accommodation of the negro boys and girls. And so the necessity of providing for the education of the white girls of the city is the one need that the Board of Education cannot escape. This is a sufficient reason for maintaining the Tubman High School.

Your Committee bears cheerful testimony to the faithful performance to all duties devolving upon the principal and his assistants. They have been devoted to the work, and the popularity of the School is a sufficient evidence of efficiency. Your Committee unanimously reports that the status of the Tubman High School is satisfactory and that the present management be continued.

Respectfully submitted,

JOS. GANAHL, Chairman,
and others Committee.

REPORT OF COMMITTEE ON HEPHZIBAH HIGH SCHOOL.

Report: The committee to whom was referred the investigation of the status of the High Schools under this Board, and their relation thereto, with instruction to report to the July meeting of the Board, and submit such recommendations as in its judgment may be proper or necessary, make the following report:

HEPHZIBAH HIGH SCHOOL.

Your committee find that the Board of Education of Richmond County, commenced relations with this school in 1876, when Mr. James Carswell was the principal thereof. It was theretofore from 1860, when first instituted, exclusively, conducted and controlled by the Hephibah Baptist Association.

Mr. Carswell informs your Committee, no minute of the matter appearing in the records of this Board, that it was agreed between the Board and the Association that the latter should select and nominate a teacher for the School and the Board should, if the nominee were satisfactory, elect him to the position. That this teacher should be paid six

hundred dollars per annum from the funds of the Board; that tuition fees of $15 per annum should be collected by the teacher from the pupil, which sums were to be credited to the six hundred dollars. In this way the expense of the High School to the Board would be reduced to about $300 per annum. The principal was allowed to charge full tuition fees for pupils residing outside of Richmond County, without accounting for the same to the Board.

Since that time this Board has agreed to pay to a teacher of vocal music the sum of $20 per month for nine months, or a total of $180 per annum.

This contractual relation has continued on and exists to this day. Mr. Carswell was succeeded by Mr. Ellington, and Mr. Ellington by Mr. C. H. L. Jackson, the present incumbent, who has held the position for twelve years past.

The Association owns the building in which the school is conducted. This Board owns the school furniture, pays insurance on furniture and building, keeps the building in repair and pays salary of Janitor.

Besides these the Principal receives from the Local Trustees of Hephzibah Village $540.00 per annum; from 121st District $400.00; from 124 District $61.00; making a total of $1,601.00, which when added to insurance, $25.00; janitor, $72 and music, $180.00, makes a grand total of $1,878.00, which this Board and the Local Trustees pay annually towards the support of this School.

The principal is nominated to this Board by the Local Trustees of Hephzibah District. He appoints his own corps of assistants with the approval of these Local Trustees. This corps at present consists of R. E. Cobb, Musical Director; Miss Sarah A. Kilpatrick, Primary Department; Miss Clara M. Seago and Miss Baker, Intermediate Department; Miss Sarling, Elocution; Miss Hattie E. Carswell, Art Department.

The assistants do not derive any qualification from examinations and certificates demanded by this Board of other of its teachers.

The School is a large one. From the report made to Hepzibah Baptist Association in October last, we find the enrollment reached in 1896 to the number of 299 pupils.

After a searching inquiry your Committe have reached the conclusion that the School in all its grades is excellent; conducted with great fidelity in all of its departments; giving with intellectual development, exemplary moral training and religious example; and that the cause of education is advanced to the full value of the money paid out by this Board.

The situation is anomalous and is hardly consistent with the scheme upon which the Public School System of Richmond County was instituted by Act of 1873 and subsequent amendments.

The scheme was for this Board and the Local Trustees thereof, to conduct and maintain their own Schools *exclusively;* not to support private or other Educational Institutions of the County.

It is easy to discover errors; it is difficult to provide a remedy; for it so happens that the remedy often is worse than the disease.

To withdraw our pecuniary support from the Hepzibah High School, at a time we are not financially competent to provide another of

equal value to the cause of education would work greater wrong than to allow the anomaly to continue.

Your committee, therefore, advise that for the present no action changing the present status and relation of the Hephzibah High School towards this Board be taken.

They opine, however, that the school should come more strictly under discipline and superintendence of this Board.

To this end your committee recommends that the assistants of the school be required to undergo due examination and obtain the certificates required of other schools under our system; that the curriculum of its departments and the text books used be submitted to the Secretary of this Board and our Text Book Committee, and that the corps of teachers be submitted to this Board for election, as is the Principal of the school.

Respectfully, &c.,

JOS. GANAHL, Chairman, and others Committee.

REPORT OF COMMITTEE ON WARE HIGH SCHOOL.

AUGUSTA, GA., July 10th, 1897.

To the Board of Education:

The committee appointed to investigate the status of the High Schools of the city and county, to ascertain the relation they sustain to the Board of Education, and to make such recommendation thereon as in their judgment seem wise and necessary, beg leave to make the following report and recommendations regarding the negro high school known as the Ware High School:

This school has been in operation under the Board of Education for the past fifteen or sixteen years. It was first under the charge of one teacher, Richard R. Wright, and was located on upper Reynolds street. When Wright resigned, four or five years ago, he was succeeded by Henry L. Walker, the present incumbent, and the school was moved to the corner of Twiggs and Walton streets. The number of pupils increased to about sixty, and an additional teacher was added as an assistant to the Principal. The school has been in a very prosperous condition, and the Principal and his assistants have done faithful and satisfactory work, so far as their teaching is concerned. The Principal of the school is paid $807.50 and the assistant $340; the janitor is paid $45; incidental expenses about $100, making a grand total of expense of $1,292.50. The tuition fees amount to ten dollars a year for each pupil. The amount collected this year has been about $450. This makes a net cost of the school of $842.50.

Your committee has been informed that four or five hundred negro children are annually turned away from the primary grades of the city schools because they are unable to find seats. The Board of Education is not able to erect additional buildings and employ additional teachers for the accommodation of this large number of negro children who desire to obtain the rudiments of an English education. A very natural in-

quiry suggesting itself to your committee is, whether it would not be best to take the $842.50, which represents the net cost of running the negro high school for the benefit of about sixty pupils who desire to study the higher branches, and with it employ four primary teachers, who would teach about 250 pupils the rudiments of an education? It certainly seems wise to give as many negro children the advantage of a primary education as possible, and teach them all to read and write and calculate, rather than advance a few of them through the high schools. If the Ware High School be abolished by the Board of Education, the same money that it now costs will accommodate 250 more children in the primary schools.

Your committee observes the fact that there is no lack of high schools for negro children in the city. There is the Haine Industrial School, the Walker Baptist High School and the Payne Institute, all designed for the higher education of negro boys and girls. While these are denominational schools, yet the fees they charge are moderate, and is not in evidence that their teaching is sectarian. Your committee believes that all of the students now attending the negro high schools can be accommodated in these schools, without additional expense to them, thus leaving the Board to divert its funds to the primary education of the race.

Your committee believes that the Board of Education is not able to maintain the negro High School and also extend the negro primary schools. The lack of funds forbids this, as we are confronted with the question of the best disposition of the money in hand. Having heard from the Principal of the school and other members of the colored race, and having carefully considered the question in all its bearings, your committee makes the following recommendations:

1st. That the High School for negro children known as the Ware High School be discontinued by this Board. This is not to be considered as a reflection upon the ability or faithfulness or character of the work done by the teachers in charge, but is for purely economic reasons in the education of the negro race.

2nd. That the City Conference Board be requested to open four primary schools in the same building at a cost of about $200 apiece for the accommodation of those negro children who are annually denied admittance to the schools.

Respectfully submitted,

JOS. GANAHL, Chairman, and others Committee.

These reports were duly made to the July meeting and upon full consideration were adopted.

At the same time when the vote was taken on the report on the Ware High School it was unanimously "resolved that the Board reinstate the said school whenever the Board could afford it."

Subsequently to the Boards' temporary suspension of the Ware High School, a number of colored people petitioned the Board for a recision of this action, among whom were the complainants herein. A full Board was called and convened on the [illegible]th day of August, 1897, and the petitioners were heard. Their petition and the reasons given, were

fully considered. The Board, after a session and deliberation of over two hours, refused to rescind.

GENERAL INFORMATION

CONCERNING THE PUBLIC SCHOOL SYSTEM OF RICHMOND COUNTY, FOR THE INSTRUCTION OF TEACHERS AND THE BENEFIT OF THE PUBLIC.

The Board of Education consists of thirty-six members, three from each of the five city wards, five country districts, two incorporated villages, and the Ordinary of the County, ex-officio. Members must be freeholders and residents of the county. The term of office is three years and an election occurs every November to fill the vacancies on the Board, the term of one-third of the members expiring annually. The Board meets regularly on the second Saturday in each month, and the President is chosen from among its members. The Secretary, who is also the County School Commissioner, is chosen annually at the meeting in January.

The schools in each district and village in the county are under the entire control of the local trustees. The teachers are chosen by them, the length of the term is regulated by them, and all matters pertaining to the schools are referred to them, under regulations of the Board of Education. In the city the schools are under the charge of the Conference Board of City Trustees, which consists of all the members from the five wards, of which the President is chairman.

The school fund at the disposal of the Board is annually divided according to the school population among the city wards, the five country districts and the two villages, after reserving a fund for the general expenses of the Board and for the High Schools. By this means each set of local trustees can see the amount at their disposal and can regulate their school accordingly. They have few or many teachers, a long or a short term, build and repair just as they please and as their funds permit.

Each district, village and the city wards run a separate set of schools, and yet the whole system is controlled by one Board of Education, and the actions of the various local trustees are under the supervision of suitable committees from the General Board.

The Secretary and County School Commissioner is in general charge of the whole. The teachers in the High Schools are chosen by the entire Board of Education. Those in the City Schools are chosen by the Conference Board of the City Trustees, which consists of the twelve members from the four wards. Those in the Country Districts are chosen by the Local Trustees in which the district is situated.

ARGUMENT.

The Board, on full consideration, in the exercise of its administrative powers, legislative and judicial, temporarily suspended the Ware High School. Because: 1st. There was no want of the people for the same

in view of the fact that three other High Schools were in full operation for the colored race. 2nd. There was need for primary schools for the colored race, and the same money and building which carried on tuition for sixty pupils in the High School was competent to conduct the teaching of 200 children in primary schools. 3d. The funds of the Board being insufficient at the present rate of taxation to conduct both, the Board discriminated between the blacks who asked for a High School and the blacks who asked for primary education. The former amounted to 60, the latter to 200.

The Board has not taken from their colored friends any benefit, nor denied them any protection, nor destroyed any quality that heretofore belonged to them.

This is the sin of the Board of Education—that it temporarily suspended a school which, in their judgment, the people did not need, to supply schools the people did need.

Is their action illegal and void for want of authority?

The injunction order enjoins the Board from conducting the Tubman High School, and giving assistance to the Hepzibah High School, by restraining and forbidding it from using any of their funds in support of these schools, until the Board shall establish a High School for the colored people.

POINTS.

I. The petition is without equity for injunction.

(a). It is not equity to destroy one thing to create another. If the complainants were deprived of a legal right to have a High School for their children, let that right be asserted and obtained. But to obtain it by depriving others of a like right is to remedy one wrong by the perpetration of another.

Because John's hat has been wrongly taken from him, does not justify John in demanding that Jim's hat be taken from him also.

This is not the language of equity, but of spite.

(b). The right to a High School for complainants' children is not a *clear* right. It is nowhere denied that in suspending the Ware High School the Board exercised a legislative power in good faith, and as it conceived for the benefit of the whole people. Nor is it denied that this act did enure to the public benefit, and to the substantial benefit of the colored race?

To pronounce this formal act done on full consideration by the Board in its legislative capacity (meeting of July), and its judicial capacity (meeting of August), as unconstitutional, or what is the same thing as unwarranted by the statute of 1872, will not be done, save in a case of undoubted usurpation or misapprehension.

Construction to be in favor constitutionality.

The repugnance must be beyond reasonable doubt.

Adams vs. Howe, 7 Am. D., 216 ; 25 Am. Dec., 677.

"It has become a maxim that a statute cannot be declared unconsti-
"tutional unless it is plainly shown to offend some specific provision or

"necessarily implied prohibition, and that to doubt is to sustain the "act."

Endlich, Sec. 525, p. 738.
Cooley, Cons. L., 208.
Cooley, Cons. L., 192, 222.

To same effect: Turman vs. Cargil & Daniel, 54 Ga., 663.

To declare the power of the legislature illegally exercised is a solemn matter and needs be weighed with careful consideration.

Gunn vs. Hendry, 43 Ga., 559.

Even if the law is against natural justice, the Court cannot pronounce it unconstitutional for this reason.

Macon & A. Railroad vs. Little, 45 Ga., 371, 388.

To same effect are decisions in U. S. Supreme Court.

"Whether the legislative department has transcended the limits of its "constitutional powers is at all times a question of much delicacy, which "ought seldom, if ever to be decided in the affirmative in a doubtful "case. * * * The opposition between the law should be such that "the Judge feels a clear and strong conviction of their incompatability "with each other."

Fletcher vs. Peck, 6 Cr., 128.

"Every possible presumption is in favor of the validity of the statute, "and this continues until the contrary is shown beyond a rational "doubt." * * *

"One branch of the government cannot encroach on the domain of another without danger.

"The safety of our institutions depends in no small degree on a strict observance of this salutory rule.

(Chief Justice Waite) Sinking Fund Cases, 99 U. S., 718.

(c) The right of complainant's children to a High School is not clear, because the terms of Section 9 of Act, 1872, refer to and apply to primary schools only, and do not apply to pay High Schools authorized to be conducted by the Board exclusively under Section 10 of Act, 1872, and amended by Acts of 1877.

The schools, primary and high, are of different grades and class. The 9th Section refers to trustee schools, such as in the 6th Section are referred to (last sentence in the Section) which declares: "The trus- "tees in each school district shall have exclusive authority to establish "such schools within their jurisdiction as in their judgment may be ex- "pedient."

The 9th Section provides that these schools are to be managed by the Board under the advice and assistance of the Trustees in each ward that the white and colored youth shall be taught in separate schools, and "the same facilities for each as regards school houses and fixtures, "attainments and abilities of teachers, length of term, time and all other "matters appertaining to education, but in no case shall white and "colored children be taught together in the same school."

The next Section 10th, refers to High Schools and by Act of 1877, Pay High Schools. They are called schools of Higher Grade, which the Board of Education *may* establish at such points in the county as the interests and convenience of the people may require. They are to

be under the special management of the Board at large, who . . ll have full power over them.

The schools referred to in Section 9, are not only of a different class and of lower grade from those spoken of in Section, 10th, but a different rule is given for their institution and conduct. The latter are to be established, not in each ward, village and district of the county, not for each race, but as the interests and convenience of the people may require.

It follows that the language in the 9th Section requiring equal facilities for each race and enumerating the duties imposed here has no application to Pay High Schools provided for in the 10th Section and the general language in the 9th Section, "all other matters pertaining to education" does not refer to Pay High Schools.

It is a rule of interpretation that general words closing an enumeration of particulars do not extend to particulars that are of higher grade and rank than any ot those contained in the enumeration.

Perkins vs. Perkins, 21 Ga., 16.

White vs. Ivey, 34 Ga., 199; Torrance vs. McDougal, 12 Ga., 526.

(d) The right is not clear, because the Board as a Court and governmental agency of this state, has decided from its earliest to organization, that it may establish High Schools in its discretion, guided only by the consideration of the public wants, and not on any other line. So it established a white High School for boys in the city of Augusta and then abolished it. It established a High School for white boys and girls in the village of Summerville and abolished it. It established Tubman High School for girls, because of the geeat want of such a school, and of the benefaction by Mrs. Tubman. It assisted the Hepzibah High School because of the large returns in the way of education. It established the Ware High School for colored boys and girls when there was a want for this school, and discriminated in favor of the race by charging $10 tuition instead of $15 per annum. It suspended the Ware School when it found three other High Schools for the race, with building, apparatus and endowment of $13,000 per annum, because in the judgment of the Board, the want which it supplied was filled by equal facilities from other sources, and at a less cost.

The construction of a statute by the officers who execute it ought to have the force of a judicial decision.

Bruce vs. Schuyler (Illinois, 1847), Am. Dec., Sec. 447.

In case cited the Court say:

"In the case of Boyden vs. Brookline, 8 Vt., 286, and Schaffer vs. "Bloomfield, Id., 478, the Court decided that a construction of a statute "by the officers to whom its execution is entrusted, ought to have the "force of judicial decision.

"It has also been decided that a contemporaneous is generally the "best construction of the law. It gives the sense of the community of "the terms made use of by the legislature. 17 Mass., 143; 2 Mass., 477.

"After the Judges of the Supreme Court of the United States had "held Circuit Courts for little more than half the period that this law "has been acquiesced in under the law of congress, they unanimously

"determined that it was too late to inquire into the law—that practice "and acquiesence under it for such a length of time had fixed its con- "struction.

"The present is a stronger one of contemporaneous construction, and "justifies a resort to the maxim—*Communis error facit jus.*"

46 Am. Dec., 450. The Court, speaking of a construction of a statute given it by the usage of conveyancers at the time of its passage says:

"It has for its support the usage of the skillful conveyancers contem- "poraneous with the statute, and this is a consideration of great force "and one that should control and in no case be departed from without "most cogent reasons."

Chestnut vs. Shore's Lepee, 16 Ohio, 47 Am. Dec., 390.

"Courts feel themselves constrained to uphold, where it is possible "contemporaneous interpretation of statutes."

In re will of Warfield, 22 Cal., 51; 83 Am. Dec., 49-58. In construing statutes applicable to public corporations, Courts will attach no slight weight to the practice under them if this practice has continued for a considerable period of time.

French vs. Cowan (Me.), 4 New England R., 682-686, cited in Endlich, §357.

See Endlich, Ch. XIII., usage and contemporaneous construction of statutes, §357, §363.

(e) There is no injury done to complainants. . The bill does not aver or the evidence show that complainants' children would not receive equal facilities of education at the other High Schools in the city of Augusta, and for a less sum of tuition money and at school houses equally accessible.

The only excuse here is that these schools are sectarian. They do not show that they teach Presbyterian Latin, Methodist Geometry or Baptist Rhetoric. There is no creed, says Bacon, in learning and science.

The Court says, they should not count because they are independent of the Board. They are not independent, they are allies in the great cause for which the Board was instituted.

(f) Injunction will not issue when it does more harm to others than it will do good to the complainants.

The white youth have done complainants no harm. They at least are innocent of wrong; yet the Court would, in the midst of their studies, shuts up their schools and leaves them without shelter. They have not, as complainants' children have, other schools of like grade and less cost to receive them within their fold.

If it be a sin to have abolished the Ware High School, to abolish the white school would be an outrage.

(g) Complainants do not represent a class, much less the race to which they belong. They represent their special injuries only.

"Injunction is applicable only to special injuries in violation of pri-
"vate right. Individuals are not authorized to redress public griev-
"ances at their own suit."

Del. & Md. R. R. Co., vs. Stump, 8 Gill & Johnson, 479; S. C., 29 Am. Dec., 561.

This seems to be the radical error which beset the Court. He argues all the time as if the colored people were before him as a class aggrieved. The complainants are not even in sympathy with a large majority of their race. These comprise the great number who are too poor to afford a High School, and the great number who prefer the High Schools of Lucy Lane, of Haines Institute, and the Walker Baptist.

(h) The small set in sympathy with the complainants do not represent the race, but misapprehend their wants as a people.

The Board, planted by the legislature, and elected by the people from year to year, represent the people—people of all grades and classes, conditions, color and sex.

If their conduct in this behalf is in good faith and without fraud, it cannot be impeached.

(i) Complainants rights have not been infringed by suspension of the Ware High School.

The purpose of education by taxation is the prevention of crime and the amelioration of the human race. On no other theory can taxation for this purpose be defended.

The educational tax fund is used best when it is used for the widest and most thorough dissemination of education.

The private benefit which an individual may receive from this fund (as from any other fund raised by taxation), is incidental. The objective point is the general improvement of the state by the education of its children.

Every individual has an interest in the distribution of this fund. But it is a public and not a private interest. That is, a right to see that the fund is used for the best interests of education, not a right necessarily to participate in the direct benefits incidental to such use.

Many taxpayers (possibly a majority of them), can receive no direct benefit; either because they have no children of school age or for any other reason.

It follows from this that the action of the Board in abandoning a field of education already amply and satisfactorily covered by institutions, and confining their efforts to those fields which are otherwise insufficiently covered, thus securing the widest and most thorough dissemination of knowledge possible with the means at hand, have not infringed the rights of anyone.

II. THE FOURTEENTH AMENDMENT.

(a). The action of the Board is not unconstitutional as running counter to that clause of XIV Amendment which forbids a state, "to deny to any person within its jurisdiction the equal protection of the laws."

There is nothing new in this provision. It is old as "Magna-Charta." As Macauley beautifully says: "This great charter of human rights embodied principles so great and potent, that their evolution through many ages has brought about the state of things under which we now prosper; where no man is above the majesty, and no man below the equal protection of the law. It is expressed in the constitution of every free state in emphatic terms."

"Protection," says the Constitution of our State, "to person and property is the paramount duty of every government, and it shall be impartial and complete. Code, §5699.

And again it is reiterated, in the forbidding of class legislation. Code, Sections 5732, 5715.

The Supreme Court of the United States has conservatively construed this clause of the Fourteenth Amendment. It means only that certain children of the state must not be discriminated against on *account* of color, race or previous condition of servitude. If the rule that excludes be other than the color line—be conditions and limitations applicable alike to both races—the amendment does not apply.

The acts forbidden are those of discriminations against the negro on account of race and color only—discrimination against the negro, because he is a negro.

Slaughter Houuse Cases, 16 How., 36.
Strauder Case, 100 U. S., 303.
Virginia vs. Rives, 100 U. S., 313.
Ex parte Virginia, 100 U. S., 339.
Neal vs. Delaware, 103 U. S., 370.
Bush vs. Kentucky, 107 U. S., 110.
Yick Ho vs. Hopkins, 118 U. S., 356.
Gibson vs. Mississippi, 162 U. S., 565.
Plessy vs. Ferguson, 163 U. S., 537.

In the case of the *State ex rel. Clark vs. Maryland Inst. for Promotion of Mechanic Arts*, decided by the Court of Appleals of Maryland, June 28, 1898, reported in 41st Atlantic Reporter, 126, being a Mandamus to compel admission into a private school established by the State of a colored pupil, averring the refusal to be a violation of the 14th amendment to the Constitution of the United States, the Court refused to sanction the writ, stating in his opinion, page 129, as follows:

"Enlightened legislation is not enacted on the narrow-minded principle that a benefit conferred on one object is necessarily something unjustly withheld from another. Let us suppose, for the sake of illustration, that there was a school of great merit, conducted exclusively for the instruction of colored pupils in branches of learning not taught in the public schools, and that the legislature saw fit to appropriate

money for the tuition of a number of colored pupils. It is not probable that such action would be assailed as forbidden by the Fourteenth Amendment, because of an unjust discrimination against the whites. But it cannot be doubted that the legislature has ample power to make appropriations to special objects, whenever in its judgment, the public good would be thereby promoted. It has constantly exercised this power from the beginning of the state government. The legislature may make donations without regard to class, creed, color or previous condition of servitude. The only condition limiting this exercise of this power is that it must in some way promote the the public interest. The state has never surrendered this power to the general government, and never can surrender it without stripping itself of the means of providing for the good order, happiness, and general welfare of society. The benefits conferred in this way are matters of grace and favor which the state bestows on its own citizens for worthy public reasons. They certainly cannot properly be described, in the language of the Fourteenth Amendment, as "privileges or immunities of citizens of the United States." If they were such they could be demanded by any citizen of the United States, whether resident in Maryland or Oregon. And in that event, and only in that event, they would be comprehended within the scope of the Fourteenth Amendment. Slaughter House Case, 16 Wall, 36. It is needless to say that the legislature is not limited by the state constitution in the particular mentioned."

(b). LEGISLATIVE CONSTRUCTION OF FOURTEENTH AMENDMENT—DISCRIMINATION ON ACCOUNT OF COLOR A CRIME.

"Every person who under color of any law, statute, ordinance, regu-"lation or custom, subjects or causes to be subjected any inhabitant of "any state or territory, to the deprivation of any rights, privileges or "immunities secured or protected by the Constitution of the United "States." * * * On account of such inhabitant being an alien, or by reason of his color or race shall be punished by fine of not more than $1,000, or by imprisonment not more than one year, or by both.

Act 31st May, 1870.

Rev. Statutes, §5570.

Apply to this Board of Education the terms of this statute :

1. It has deprived the complainants of a right to a High School.

2. This deprivation is on account of complainants' race and color.

3. This deprivation is made under a rule and regulation, which is a mere color, cover and pretence to the true design.

This statute was intended to secure the colored race the full benefit of the Fourteenth Amendment, and to assure them of the equal protection of the laws. It was written by Mr. Sumner, with the amendments before him, and was designed to meet its demands.

The provisions are a test of whether the amendment has been disobeyed.

It follows if the amendment has been disobeyed by the Board in its action touching the Ware High School, the misdemeanor may be punished on the criminal side of the Court, but a Court of Equity has no place in the premises.

III. GOVERNMENT BY INJUNCTION.

Even in a clear and imperative case, the Court might pronounce the action of the Board in suspending the Ware High School as beyond the powers given to it by the organic act of 1872, it does not follow that the Court may remedy the wrong, by suspending other High Schools established by the Board. The right to establish, dissolve and suspend High Schools is given by the legislature to this Board, and to no other person, least of all to a judicial officer, since this is a legislative act. Therefore, when the Court undertakes to suspend a High School, duly established it becomes a clear case of judicial legislation, and when this honorable judicatory attempts to enforce this legislation, by process of injunction, we have a fresh case of that modern anomaly. "Government by Injunction."

And worse, what is this but converting a beneficient instrument of preventive justice—the peculiar property of a tribunal founded on conscience and conservatism, and justly proud of the title of equity—into an engine of punishment?

Torture by injunction is substituted for the rack and thumbscrew of inquisition. The fairest temple of our law is transformed into a penal court, where sentence is pronounced without jury, and methods obtain which recall the Star Chamber of the Stuarts.

This is not the language of exaggeration.

The case remains open "until the further order of the Court," until, that is, the Court shall have established a high school for negroes, which is in his judgment of equal facilities with the white school.

A Court of Equity has taken control of a political government of public officers and administers their exclusive duties.

The Court has treated the powers and functions of a legislature as so much property. It seizes and administers them as it would seize and administer an estate for the benefit of creditors.

The complainants, Cumming, et al., have an interest and vested right in this property and the concern is held up in order to secure their claim.

The assumption of one department powers belonging to another, all history and experience shows is inconsistant with free institutions. It is the feature then distinguishes personal government from government by law.

If the complainants have rights they are not to be obtained by recourse to despotism.

Let us pursue this thought to its logical conclusions:

Should the case go back to the Superior Court by a mandate from this Court, the Board will apply, say, for time to enable it to establish the school for complainant's children. It will be necessary to borrow

the money, provide a building, appoint teachers and effect other details for the new institution. The Court will in good conscience grant a reasonable delay. When the Board shall report that it has obeyed the order of the Court, its repert wiil in due course be examined and inquiry made if the new school be of equal educational facilities, to that of the Tubman High School; and the complainants be heard to show cause why the defendant be not discharged; complainants for cause shows that the new school is not equal to the Tubman School in many particulars; that the building is not as good, that French is not taught therein, that the teachers are not as numerous nor as competent. Thereupon the Court will order these discrepancies to be remedied. When finally this shall be accomplished, and the Court is satisfied that the school for Cumming, et al, has been made of equal facilities with the Tubman, the case is concluded and Board asks for discharge.

But as the Board has heretofore, in the exercise of its discretion, suspended the Ware High School, and so soon as discharged hence, may do the same thing with the Cumming school, it is but equitable to the complainants that by the decree of the Court they be protected from this wrong. Whereupon an order issues that the Board be enjoined from abolishing or suspending or in any wise altering the equal facilities quality of the Cumming school, and be discharged hence with costs.

With this halter round its neck the Board is discharged, subject to be brought up for disobedience of the Court's order whenever in complainants judgment the equal facilities of the new school quality shall be impaired.

To this complexion do we reach when a Court assumes to take charge of and administer the functions of a public and political corporation, as it would a money fund for the benefit of creditors, and govern the people by the process of injunction.

MOTION TO DISMISS.

The judgment of the Supreme Court of Georgia here to be reviewed is in the following language:

"This case came before this Court upon a writ of error from the "Superior Court of Richmond County, and after argument heard it, "is considered and adjudged that the judgment of the Court below be "reversed, because the Court erred in granting an injunction, all the "justices concurring."

Printed Record 39.

The judgment of the Superior Court of Richmond County on the remitter from the Supreme Court is as follows:

"The remitter from the Supreme Court, reversing the judgment of "this Court, because the Court erred in granting an injunction, it is "ordered:"

"1. That the same be entered on the minutes of this Court, and the "judgment of the Court be reversed on the ground stated."

"2. That the plaintiffs in the case be and they are hereby refused all the relief prayed for, and the petition dismissed at their costs."

Printed Record 38–39.

The judgment denying and refusing the writ of injunction to the complainants rests essentially on ten grounds, each of them broad enough to support the same without reference to the 14th Amendment or other Federal questions. There are;

That the right of injunction is not shown. Because

1. It is not equity to destroy one thing in order to create another.
2. The right of injunction is not clear nor the case urgent.

Code of Georgia, §4902.

3. Under Section 10 of Act 1872 as amended by Act of 1877, the Board may establish pay high schools in the county *as the interest and convenience of the people* may require, and it is nowhere shown that the interest and convenience of the people was in any way counter to their action.

4. The Board has always exercised the right to establish and abolish high schools for pay in the county independently of any other consideration than that of the interest and convenience of the whole people, and this action and construction of their powers and duties has been of 25 years duration, and has the force of a judicial decision.

5. No injury has been done to complainants. Other schools of high grade being open to their children with equal facilities of education, for less tuition money, and of equal acceptability.

6. Injunction will do harm to others, while of no benefit to complainants.

7. Complainants have no right to represent a class nor the race to which they belong.

8. Complainants do not represent the wants or interests of their race. These interests are represented by the Board.

9. No rights of the complainants have been infringed, since the action of the board in suspending one field of education amply covered by other institutions and confining their efforts to those fields insufficiently covered, and thus securing the widest and most thorough dissemination of knowledge possible with their means at hand, have not infringed the rights of any one.

10. A Court has no power in equity to enjoin a pay high school established by the Board. To do so would be to usurp legislative powers and institute a despotism.

If the judgment refusing injunction *could* have been rendered outside of and independently of a Federal question, this Court will decline jurisdiction, and dismisses the writ of error.

Eustis vs. Bolles, 150 U. S., 362.

Affirmed in Harrison vs. Morton, 171 U. S., 38.

All the assignments of error are defective and demurrable for insufficiency.

The thing forbidden by the provisions of the 14th Amendment is discrimination against the negro race, *on account* of his color and race or previous condition of servitude.

If discrimination have arisen on any other line of cause or reason than the line of color and race the amendment has no application.

It follows that the assignments shall not only aver differences but must aver them to be discriminations by the white race in favor of the white race, and against the colored race, because of the latters color and race and not because of any other cause and reason.

We proceed to the assignments severally.

First Assignment—"That the statute of the State of Georgia giv-"ing a discretion to the County Board of Education to establish and "maintain higher schools for white persons and to discontinue and "refuse to maintain higher schools for persons of the negro race was "and is contrary to the Constitution of the United States, and espec-"ially to the 14th Amendment thereof."—Answer. The record shows the existence of no such statute. The act of 1872 as amended by act of 1877, does not give any such discretion. The power of the board, and its discretion was limited to the establishing such pay high schools as the interest and convenience of the people might require.

Second Assignment—"The Court decided and held that the Con-"stitution of the United States was not violated by the action of the "said board in establishing and maintaining high schools for the edu-"cation of white persons and in refusing to establish and maintain "high schools for the education of persons of the negro race." The record shows no such decision or finding. What the Court did decide and find was that the board might without violating the Constitution of the United States in the exercise of its discretion suspend a pay high school for persons of the negro race, when there were three other high schools in full operation for the colored race in the community; when there was need for primary schools for persons of the colored race and the same money and building which carried on the tuition of sixty pupils in the pay high school was competent to conduct the teaching of 200 children in the primary schools; and when the funds of the Board were insufficient to maintain both.

Third Assignment—"In deciding and holding that persons of the "negro race could consistently with the Constitution of the United "States be, by the laws of Georgia, taxed and the money derived from "their taxation be appropriated to the establishment and maintenance

"of high schools for white persons, while pursuant to the same law "the said Board refused to establish and maintain high schools for the "education of the negro race."

The error in this assignment lies in the fact, that taxation is a mere incident of the right of the Board in its discretion to suspend one of its high schools when the interest and convenience of the people do not require it.

If the Ware High Lchool could be suspended without a violation of the 14th Amendment, it is clear that any change in the disposition of the taxes consequent thereon is no violation of the amendment.

But the record shows that there has been no change in the taxation of the negro, arising from the suspension of the Ware High School. The same moneys that supported the Ware High School for colored persons, has been appropriated to the support of primary schools for the colored people.

Fourth Assignment—This is an *omnibus* clause, and we suppose not seriously delivered by the distinguished counsel for the plaintiff in error.

No. 164.
Sup. Br. of Miller for D.

Filed Oct. 26, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 164.

J. W. CUMMING, JAS. S. HARPER, AND JOHN C. LADEVEZE, PLAINTIFFS IN ERROR,

vs.

THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA.

IN ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, STATE OF GEORGIA.

SUPPLEMENTARY BRIEF OF FRANK H. MILLER FOR THE DEFENDANT IN ERROR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-26-'99

IN THE

Supreme Court of the United States

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CUMMING, HARPER, AND LADEVEZE, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, GEORGIA.

SUPPLEMENTARY BRIEF OF FRANK H. MILLER FOR DEFENDANT IN ERROR.

The brief of counsel for plaintiffs in error was filed after that of the defendant in error, and this is intended to call attention of the court to errors in the plaintiffs' brief.

First. This brief states, point 5, page 16: "In respect of "the contention stated in the brief of the other side that

" Bohler, the tax collector, should have been made a party " to this writ of error, it is sufficient to say that the petition " as to him was dismissed by the superior court at the hear- " ing (Record, p. 38), and that no appeal was taken by the " petitioners."

This contention is not an "imaginary technicality." The facts are that Bohler, the tax collector, was the person sought to be enjoined from collecting the tax levied for the support of high schools (Record, p. 4). The court sustained his demurrer as cause shown against the rule (Record, p. 7), but immediately upon rendering its decision, and at the same time the same was actually filed, December 22, 1897, by order, the court suspended this decision until a decision by the supreme court should be rendered upon the bill of exceptions to be sued out by the board of education. The case therefore stood suspended in every particular without further action until decided by the supreme court, when it was dismissed in conformity to its opinion and upon the receipt of its mandate (Record, pp. 38 and 39).

The case which was so suspended in the superior court would not have been heard by the supreme court of Georgia unless the tax collector had been made a party, and he was so made (Supplemental Record, p. 32). (See Inman Smith & Co. *vs.* Estes, 104 Ga. Reports, 645; White *et al. vs.* Bleckley *et al.*, 105 Ga. Reports, 173.)

It therefore appears that Bohler was a party to the proceeding until the final termination of the suspension by the order dismissing the entire cause (Record, pp. 38 and 39). The plaintiffs in error have elected in suing out the writ of error to the superior court of the county to omit the tax collector, which deprives this court from rendering any de-

cision that would have any effect upon the question of taxation raised in the record, it being noted, however, that there was filed in the superior court the assignments of error, with a copy of the decision of the supreme court of the State of Georgia (Record, pp. 40 and 59).

Again, there is really no constitutional question before this court, because none has really been decided adversely to the plaintiffs in error. When they filed their petition they relied on a violation of the fourteenth amendment. The superior court decided in their favor, ignoring the constitutional question and putting its decision entirely upon the construction of the State statute. From this decision the board of education sued out a writ of error to the supreme court of the State as to what was decided adversely to it, and the decision of the court below was reversed by the supreme court mainly upon the construction of the State statute, no argument being presented to the court by the plaintiffs in error asserting specifically a right under the fourteenth amendment. The plaintiffs in error never sued out any cross-bill of exceptions to the refusal to decide their case for them upon the constitutional grounds, but were satisfied with accepting the decision of the superior court upon the construction of the State statute. This construction having been reversed by the supreme court, the State superior court obeyed the reversal, and dismissed the petition in equity.

In this connection it will be noted that the supreme court of Georgia in their opinion (Printed Record, p. 53, copied in Defendant's Original Brief, p. 3), speaking of the claim of the petitioners that the action of the defendant was contrary to the fourteenth amendment, say :

"This point in the case was not argued before us by the learned counsel for the plaintiffs in error, either orally or by brief."

It is therefore insisted that the constitutional questions raised were never specifically passed on by the superior court, to which the writ of error in this case from this court was taken, and were practically waived and abandoned in the supreme court of Georgia.

Second. The learned counsel for the plaintiffs in error, undertaking to comply with rule 21, section 2, paragraph 3, and annex the statutes of the State cited, prints the provisions of the constitution of 1877. The board of education came into existence under the constitution of 1868 and the legislative acts passed pursuant thereto, all of which were of force and operative prior to the constitution of 1877, and held constitutional by the supreme court of Georgia in 72 Georgia Reports, 546. Therefore the provision of the constitution of 1877, annexed to the brief of the plaintiffs in error, has no application whatsoever, unless it may be the fifth section of paragraph 18, which ordains that existing local school systems shall not be affected. The sections of the constitution of 1868 upon which the defendant in error relies are set out in the original brief of the defendant in error, page 4, and these provide, as a constitutional right, only for a general system of education, under which alone have plaintiffs any right to be heard.

Respectfully submitted.

FRANK H. MILLER,
Solicitor for Defendant in Error.

CUMMING *v.* RICHMOND COUNTY BOARD OF EDUCATION.

ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, GEORGIA.

No. 164. Argued October 30, 1899.— Decided December 18, 1899.

The plaintiffs in error complained that the Board of Education used the funds in its hands to assist in maintaining a high school for white children, without providing a similar school for colored children. The substantial relief asked for was an injunction. The state court did not deem the action of the Board of Education in suspending temporarily and for economic reasons the high school for colored children a sufficient reason why the defendant should be restrained by injunction from maintaining an existing high school for white children. It rejected the suggestion that the Board proceeded in bad faith or had abused the discretion with which it was invested by the statute under which it proceeded, or had

Statement of the Case.

acted in hostility to the colored race. *Held* that under the circumstances disclosed, this court could not say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them, of the equal protection of the laws, or of any privileges belonging to them as citizens, of the United States.

While all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.

THE plaintiffs in error, Cumming, Harper and Ladeveze, citizens of Georgia and persons of color suing on behalf of themselves and all others in like case joining with them, brought this action against the Board of Education of Richmond County and Charles S. Bohler, tax collector.

In the petition filed by them it was alleged —

That the plaintiffs were residents, property owners and taxpayers of Richmond County, the defendant Board being a corporation created under an act of the General Assembly of Georgia of August 23, 1872, regulating public instruction in that county, empowering the Board to annually levy such tax as it deemed necessary for public school purposes;

That on the 10th of July, 1897, the Board levied for that year for the support of primary, intermediate, grammar and high schools in the county, a tax of $45,000, which was then due and being collected;

That the petitioners interposed no objections to so much of the tax as was for primary, intermediate and grammar schools, but the tax for the support of the system of high schools was illegal and void for the reason that that system was for the use and benefit of the white population exclusively;

That the Board was not authorized by law to levy any tax for the support of a system of high schools in which the colored school population of the county were not given the same educational facilities as were furnished the white school population;

That at least $4500 of the tax of $45,000 was being col-

lected and when collected would be used for the support of such system of high schools;

That the Board had on hand the sum of $20,000 or other large sum, the proceeds of prior tax levies, in trust to disburse solely for legal educational purposes in the county, and would receive from the tax levy of 1897 and from other sources large sums in like trust, and that it was the owner and had the custody and control of school fixtures, furniture, educational equipments and appliances generally, holding the same in like trust; and,

That although the Board was not authorized by law to use any part of such funds or property for the support and maintenance of a system of high schools in which the colored school population were not given the same educational facilities as were furnished for the white school population, it was using such funds and property in the support and maintenance of its existing high school system, the educational advantages of which were restricted wholly to the benefit of the white school population of Richmond County to the entire exclusion of the colored school population, and that by such use of those funds and property a deficiency for educational purposes would inevitably result, to make which good additional taxation would be required.

The petitioners also alleged that they were persons of color and parents of children of school age lawfully entitled to the full benefit of any system of high schools organized or maintained by the Board; that up to the time of the said tax levy and for many years continuously prior thereto, the Board maintained a system of high schools in Richmond County in which the colored school population had the same educational advantages as the white school population, but on July 10, 1897, it withdrew from and denied to the colored school population any participation in the educational facilities of a high school system in the county and had voted to continue to deny to that population any admission to or participation in such educational facilities; and that at the time of such withdrawal and denial the petitioners respectively had children attending the colored high school then existing, but who were

now debarred from participation in the benefits of a public high school education though petitioners were being taxed therefor. They averred that the action of the Board of Education was a denial of the equal protection of the laws secured by the Constitution of the United States, and that it was inequitable, illegal and unconstitutional for the Board to levy upon or for the tax collector to collect from them any tax for the educational purposes of the county, from the benefits of which the petitioners in the persons of their children of school age were excluded and debarred.

The petitioners prayed that the tax collector Bohler be enjoined from collecting so much of the tax levy of July 10, 1897, as had been levied for the support of said system of high schools; that the Board be enjoined from using any funds or property then held by it or thereafter to come into its hands for educational purposes in the county for the support, maintenance or operation of that system; and that they have such other and further relief as was equitable and just.

The Board of Education demurred to the petition and also filed an answer. It denied that it had established any system of high schools in the county, and averred that it was neither its duty nor had it authority to establish such a system, although it had authority in its discretion to establish high schools at such points in the county as the interest or convenience of the people required; that in pursuance of such authority it had established the Neely High School in 1876, but in 1878 its name was changed to that of the Tubman High School, when Mrs. Emily H. Tubman presented to the Board a large lot and building for the purpose of affording a higher education to the young women of the county, the Richmond Academy affording this benefit and advantage to the male sex; that the demand was urgent for the continuance of the Tubman school by the Board, and it was so accordingly determined, each pupil paying fifteen dollars for tuition per annum and non-residents of the county forty dollars, which was the charge made by the Richmond Academy for Boys; and that the property, the value of which with the fixtures, furniture and appliances was worth not less than $30,000, was

donated by Mrs. Tubman upon the express condition that in the event the Board failed to use the building for a high school the same was to enure instantly to the benefit of the Richmond Academy and the Augusta Free School;

That in June, 1876, the Board deemed it wise to give its assistance to the Hephzibah High School, conducted and controlled by the Hephzibah Baptist Association in the village of Hephzibah in the southeastern part of the county, charging and receiving for high school scholars the sum of fifteen dollars per annum;

That, in 1880, there being no high school in the county for the colored race, the funds of the Board justifying it, and other schools of lower grade having been established by the local trustees in Augusta sufficient to accommodate the colored children, the Board deemed it wise and proper to establish the Ware High School, charging for each pupil taught therein ten dollars per annum; and

That in June, 1897, a special committee appointed by the Board investigated the status of the high schools in the county and ascertained the condition of each, and the committee recommended that, for "purely economic reasons in the education of the negro race," the Ware High School be discontinued and the City Conference Board requested to open four primary schools in the same building at a cost of about $200 each for the accommodation of those negro children who were annually denied admittance to the schools.

The answer of the Board further stated: "Touching the Ware High School, its friends and the colored patrons thereof were called before the committee, and were heard by the committee with every respect and consideration. They were told the reasons that controlled the committee in its intention to recommend its discontinuance for the present. These were: Because four hundred or more of negro children were being turned away from the primary grades unable to be provided with seats or teachers; because the same means and the same building which were used to teach sixty high school pupils would accommodate two hundred pupils in the rudiments of education; because the Board at this time was not finan-

cially able to erect buildings and employ additional teachers for the large number of colored children who were in need of primary education, and because there were in the city of Augusta at this time three public high schools — the Haines Industrial School, the Walker Baptist Institute and the Payne Institute — each of which were public to the colored people and were charging fees no larger than the Board charged for pupilage in the Ware High School." After stating that the action of the special committee was approved by the Board, the answer continued: "At the same time when the vote was taken on the report of the Ware High School it was unanimously resolved that the Board of Education reinstate the said school whenever in their judgment the Board could afford it. Subsequently to the Board's temporary suspension of the Ware High School a number of colored people petitioned the Board for rescission of this action, among whom were the complainants herein. A full Board was called and convened on the — day of August, and the petitioners were heard and their request fully considered. The Board, after a session and deliberation of over two hours, refused to rescind for the reasons heretofore set out, and said that in their view, until the local trustees — *i.e.* the City Conference Board — should have furnished a sufficiency of primary schools for the colored population it would be unwise and unconscionable to keep up a high school for sixty pupils and turn away three hundred little negroes who are asking to be taught their alphabet and to read and write. No part of the funds of this Board accrued or accruing and no property appropriated to the education of the negro race has been taken from them. This Board has only applied the same means and the same moneys from one grade of their education to another grade; and in this connection defendant says that the enrolment in the colored school is this year 238 more than the last, the Ware High School building accommodating 188 pupils."

The answer of the Board, referring to the act of 1872, averred that "section 9 of said act commands the local trustees to provide the same facilities to each race as regards school houses and fixtures, attainments and abilities of teachers

and length of term, but that this section refers only to the schools established by the trustees of each school district under section 6 of said act, and does not apply to schools of higher grade; that section 10 of said act, which empowers this respondent to establish schools of higher grade than those established by the local trustees, ordains their establishment to such as the interest and convenience of the people may in the judgment of this Board require. It admits that on the 10th day of July last it suspended the Ware High School for the reason that in its judgment the interest and convenience of the people did not require it, and that it caused to be established in its stead three primary schools for colored children, and for reasons heretofore in its answer set forth. Whether or not the petitioners at the time of said suspension had children attending the Ware High School this defendant is not advised, but denies that they are debarred from a high school education in this community, since for the same charges as were made by this Board for pupilage in the Ware High School they can find this education in three other colored high schools open to the public in the city of Augusta. Defendants deny the allegations specially pleading that the acts of 1872 and 1877 deny to the colored race equal protection of the law, or that the course and conduct of this Board thereunder is obnoxious to this constitutional inhibition."

The plaintiffs amended their petition, alleging: "1st. That 'the Payne Institute,' 'the Walker Baptist Institute,' and 'the Haines Normal and Industrial Institute' mentioned in said answer, are purely private and pay educational institutions under sectarian control, and have been in existence for years past and have no connection and never have had any connection whatsoever with the public school system conducted by said Board. 2d. That said Board has no legal right to charge for extending a public high school education to the children of school age of actual residents of said county. 3d. That if a deficiency of means exists for extending a public primary school education to the colored school population of the city of Augusta in said county, said deficiency is due to the illegal action of said Board in appropriating to the white

school population of said city largely more of the public school fund than it is legally entitled to, to the corresponding detriment of the colored school population of said city, and but for such illegal action there would be no such deficiency as said Board avers."

In answer to this amended petition, the Board admitted that the Payne Institute, the Walker Baptist Institute, and the Haines Normal and Industrial Institute mentioned in its answer were private educational institutions under sectarian control and had no connection with the public school system conducted by the defendant Board. But it averred that the impression sought to be conveyed that there was sectarian, denominational teaching in those schools was untrue; that the schools referred to were open to the public generally, and any child of sufficient scholarship and moral character could enter them, whatever his or her religious belief. The Board also asserted its right to charge for tuition in high schools, and denied that any deficiency of means for extending a public primary school education to the colored school population was due to any action it had taken.

The defendant Bohler, the tax collector, demurred to the petition and also filed an answer.

The cause having been heard upon the demurrers and pleadings, the court sustained the demurrer of defendant Bohler, and refused to grant any injunction against him as tax collector. But the demurrer of the Board of Education was overruled, and an order was entered restraining the Board from using "any funds or property now in or hereafter coming into its hands for educational purposes in said county for the support, maintenance or operation of any white high school in said county until said Board shall provide or establish equal facilities in high school education as are now maintained by them for white children for such colored children of high school grade in said county as may desire a high school education or until the further order of the court." This order was however suspended until the Supreme Court of the State should render its decision in the cause.

The plaintiffs did not appeal from the order refusing to

grant an injunction against the tax collector. But the case was carried to the Supreme Court of Georgia by the Board of Education, where the judgment of the Superior Court of Richmond County was reversed upon the ground that it erred in granting an injunction against the Board of Education. And in accordance with that decision the Superior Court upon the return of the cause from the Supreme Court of the State refused the relief asked by the plaintiffs and dismissed their petition. The plaintiffs in error complain of the latter order as being in derogation of their rights under the Constitution of the United States.

Mr. George F. Edmunds for plaintiffs in error.

I. As construed by the Supreme Court of Georgia, the constitution and laws of that State justified the Board of Education in maintaining, at the expense of the plaintiffs, public high schools for white children, and in abolishing and refusing to keep up any similar or equivalent school for the education of colored children. The record shows that the colored high school was necessary for the education of the same class of colored children as that of the white children, for which two public high schools were provided. It shows that there was a sufficient number of colored children receiving the benefits of the colored high school when it was abolished, and that their parents protested against its abolition. It shows that the defendants themselves considered the colored high school necessary by declaring, in connection with their abolition of it, that they would reinstate it "whenever the Board, in their judgment, could afford it."

II. It may be assumed that the decision of the Georgia Supreme Court, that the constitution and laws of that State warranted the action complained of (whether reviewable here or not) was correct, although it would seem reasonably clear that the opinion of the inferior court was the sound one, unless the constitution and laws of Georgia were designed by their framers to be illusory.

III. The question, then, is whether the Board of Education,

under its authority to "establish schools of higher grade at such points in the county as the interests and convenience of the people may require," authorized it to establish and maintain the advanced schools for the sole interest of the white children, and to refuse to maintain a similar school for the benefit of the colored children, while (though this makes no difference in principle) the parents of such colored children were being taxed and their money expended to maintain such higher grade white schools? Although the first section of the eighth article of the constitution of Georgia only made it *compulsory* that common schools should be established for the elementary branches of an English education, and required the races to be taught separately, the fourth section authorized counties and cities to tax for public schools, and to maintain them out of such taxation. It is under this authority that the public schools in the county of Richmond are carried on. This authorizes the counties and cities to go beyond elementary English education, and to provide, as most civilized States do, for that larger education which teaches not only reading, writing and arithmetic, but those things which lead to the enlargement of mental perceptions, respect for social order, and, indeed, everything that may tend to make the best state of society. It is under this authority that the board of education has undertaken to discriminate distinctly and by name between the two races, and to impose upon one burdens of taxation from which they and their children receive no benefit, for the purpose of giving educational benefits necessary to public interests, to the white children alone. The sole pretence for this discrimination is, as expressly stated by themselves, that they cannot afford it. That is, that all of the public funds applicable to education of the higher grade in the public schools shall be devoted to the benefit of the white children, and none of it applied for the similar education of colored children. The excuse stated being that the Board does not wish to increase taxation which they have the power to impose (then only one fourth of one cent per $100), and that it can make good use of the money that would otherwise be expended in support of a colored high

school, for the elementary education of some colored children for which the common school houses at that time furnished no accommodation. It is not anywhere hinted by the defence that there were not adequate accommodations for all the white children, both in the common and high schools; from which it conclusively follows that the public funds have been devoted to the complete provision for all the white children, when they had not for the colored children. The Board of Education was, under the law as construed, the master of all this. Every provision, therefore, having been made for the full education of the white children, and inadequate provision having been made for the elementary education of the colored children, the Board abolishes the colored high school because it cannot afford to maintain it. This, it is earnestly submitted, is not the reasonable exercise of such discretion as the Board may have lawfully had, or the exercise of any discretion at all. It is the arbitrary denial of the equal protection of the laws to these persons of the colored race. It is believed that all the numerous decisions of this court upon this and analogous subjects are agreeable to the foregoing statement. It is unnecessary to refer to more than a very few of them.

In *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, it was held that the prohibitions of the Fourteenth Amendment referred to all the instrumentalities of the State, legislative, executive and judicial, and that if any public officer under a state Government deprives another of any right protected by that amendment he violates the Constitution. In *Gulf, Colorado &c. Railroad* v. *Ellis*, 165 U. S. 150, 154, it was declared that constitutional provisions of the character herein questioned should be liberally construed, and that the courts should be watchful to guard against any stealthy encroachments thereon, and that otherwise the protecting clauses of the Fourteenth Amendment would be a mere rope of sand, in no manner restraining state action. It declared that classifications and distinctions could not be made arbitrarily. In this case the discrimination was arbitrary, no matter how good the motive of the Board may possibly have been. If such action can be upheld, the Board will forever be

the sole judge of when it can "afford" to give the colored race the same advantage of public education that they tax them to give to the whites. If there is really any life or spirit in the Fourteenth Amendment, such conduct cannot be upheld. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, this court said that, in spite of what the state court might have thought about it, it would put upon the ordinances of San Francisco an independent construction, and determine whether the proceedings under them were in conflict with the Constitution of the United States or not. In that case the ordinance vested in a board of supervisors the discretion of granting or withholding their assent to the use of wooden buildings as laundries, and so forth. The state court held that that was a discretion not judicially reviewable. This court denied the proposition, and held that while the ordinance gave absolute power to the board, the power was not confided to it as a discretion of regulation, but was to be exercised at their mere will, and that, so construed, it could not be maintained when exercised so as to produce inequality. This court held that the Fourteenth Amendment required "not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights;" and that "no greater burdens should be laid upon one than are laid upon others in the same calling and condition." This court held that the principles upon which our Constitution rests do not "mean to leave room for the play and action of purely personal and arbitrary power." And it held that where the law gives a discretion, that discretion cannot be used, under color of regulating, to subvert or injuriously restrain a right, and that such questions are always open to judicial inquiry. To use the language of this court in that case, the Board has, in the exercise of its authority, applied and administered the law with "an unequal hand, so as practically to make unjust and unethical discriminations between persons in similar circumstances, material to their rights;" and that in such case "the denial of equal justice is still within the prohibitions of the

Constitution." The case of *Plessy* v. *Ferguson*, 163 U. S. 537, chiefly relied upon by the other side, is entirely consistent with and supports our contention. The case itself determined that a state law requiring separate railway carriages for the two races was valid, if provision were made for equal accommodations for both races, and the case stood upon the solid and indisputable ground that neither race was discriminated against in any particular, and it quoted with approval the opinion of the Court of Appeals of New York, that "when the Government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized," and so forth. In *Strauder* v. *West Virginia*, 100 U. S. 303, this court held that the Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government in that enjoyment whenever it shall be denied by the States." The court further said that the words of the amendment, while prohibitory, "contained by necessary implication a positive immunity of right, most valuable to the colored race — the right to exemption from unfriendly legislation against them distinctively as colored — the exemption from legal discriminations implying inferiority in civil society, lessening the security of their rights which others enjoy," and so forth.

IV. It will thus be seen that the fact that the school Board had authority to establish and maintain public high schools at convenient places, and so forth, gives them no authority to establish and maintain public high schools for one race and to refuse to maintain them for the other, when the conditions and necessities for that advanced education existed in one race as well as the other in the place where their authority was to be exercised. These necessities and conditions are by the evidence of the board itself proved to exist.

The necessity for the public high schools for the colored children is, I repeat, distinctly confessed, and the only pretence of excuse for abolishing it, as stated by the Board itself, was

that it could employ the money necessary for its maintenance more advantageously by devoting it to common school purposes, while it could continue to employ all the money necessary to carry on the two white high schools in the same place. The mere statement of the case, in view of what this court has already decided, condemns such conduct, no matter how good the motive or how ethically wise the action of the Board may have been had it not been restrained by the fundamental provisions of the Constitution, although it is not by any means admitted that the motive of the Board was purely in the public interest further than to avoid raising taxes to carry on the colored schools as well as the white ones, and although it is denied that the action was ethically wise.

V. In respect of the contention stated in the brief on the other side that Bohler, the tax collector, should have been made a party to this writ of error, it is sufficient to say that the petition as to him was dismissed by the Superior Court at the hearing, and that no appeal was taken by the petitioners. And it appears that when the case was remitted from the Supreme Court of Georgia that only the Board of Education had judgment for its costs, Bohler having disappeared, as before stated. And it further appears that it was only the Board of Education that took exceptions and carried the cause to the Supreme Court of the State. The whole relief sought against Bohler was denied, and the petitioners acquiesced. Bohler therefore ceased to be any longer interested in the cause or a party thereto. His presence as a party was not in any respect essential or proper for that part of the controversy remaining. It may be said with all respect to the learned counsel on the other side that his point as to parties is an imaginary technicality, even if the record does not show a formal dismissal of Bohler. See *Gumbel* v. *Pitkin et als*, 113 U. S. 545.

Mr. Joseph Ganahl and *Mr. Frank H. Miller* for defendant in error.

Mr. Justice Harlan, after stating the facts as above, delivered the opinion of the court.

This writ of error brings up for review a final order made in the Superior Court of Richmond County, Georgia, in conformity to a judgment rendered in the Supreme Court of the State. That order, it is contended, deprived the plaintiffs in error of rights secured to them by the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Georgia after stating in its opinion that counsel for the petitioners did not point out in his brief what particular paragraph of the Fourteenth Amendment was violated, said: "If it be the first, he does not point out what clause of that paragraph is violated, whether the privileges or immunities of citizens of the United States are abridged, whether his clients are deprived of life, liberty or property without due process of law, or whether his clients are denied the equal protection of the laws. It is difficult, therefore, for us to determine whether this amendment has been violated. If any authority had been cited, we could from that have determined which paragraph or clause counsel relied upon, but as he has left us in the dark we can only say that in our opinion none of the clauses of any of the paragraphs of the amendment, under the facts disclosed by the record, are violated by the Board. There is no complaint in the petition that there is any discrimination made in regard to the free common schools of the county. So far as the record discloses, both races have the same facilities and privileges of attending them. The only complaint is that these plaintiffs, being taxpayers, are debarred the privilege of sending their children to a high school which is not a free school, but one where tuition is charged, and that a portion of the school fund, raised by taxation, is appropriated to sustain white high schools to which negroes are not admitted. We think we have shown that it was in the discretion of the Board to establish high schools. It being in their discretion, they could, without a violation of the law or of any constitution, devote a portion of the taxes collected for school purposes to the support of this high school for white girls and to assist a county denominational high school for boys. In our opinion, it is impracticable to distribute taxes equally. The appropri-

ation of a portion of the taxes for a white girls' high school is not more discrimination against these colored plaintiffs than it is against many white people in the county. A taxpayer who has boys and no girls of a school age has as much right to complain of the unequal distribution of the taxes to a girls' high school as have these plaintiffs. The action of the Board appears to us to be more a discrimination as to sex than it does as to race. While the Board appropriates some money to assist a denominational school for white boys and girls, it has never established a high school for white boys, and, if the contention of these plaintiffs is correct, white parents who have boys old enough to attend a high school have as much right to complain as these plaintiffs, if they have not more. Without, therefore, going into an analysis of the different clauses of the Fourteenth Amendment of the Constitution of the United States, we content ourselves by saying that, in our opinion, the action of the Board did not violate any of the provisions of that amendment. It does not abridge the privileges or immunities of citizens of the United States, nor does it deprive any person of life, liberty or property without due process of law, nor does it deny to any person within the State the equal protection of its laws."

The constitution of Georgia provides: "There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races." Art. 8, § 1.

It was said at the argument that the vice in the common school system of Georgia was the requirement that the white and colored children of the State be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings. Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate and grammar schools, in the management of which

the rule as to the separation of races is enforced. We must dispose of the case as it is presented by the record.

The plaintiffs in error complain that the Board of Education used the funds in its hands to assist in maintaining a high school for white children without providing a similar school for colored children. The substantial relief asked is an injunction that would either impair the efficiency of the high school provided for white children or compel the Board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children. The Board had before it the question whether it should maintain, under its control, a high school for about sixty colored children or withhold the benefits of education in primary schools from three hundred children of the same race. It was impossible, the Board believed, to give educational facilities to the three hundred colored children who were unprovided for, if it maintained a separate school for the sixty children who wished to have a high school education. Its decision was in the interest of the greater number of colored children, leaving the smaller number to obtain a high school education in existing private institutions at an expense not beyond that incurred in the high school discontinued by the Board.

We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the Board to discriminate against any of the colored school children of the county on account of their race. But if it be assumed that the Board erred in supposing that its duty was to provide educational facilities for the three hundred colored children who were without an opportunity in primary schools to learn the alphabet and to read and write, rather than to maintain a school for the benefit of the sixty colored children who wished to attend a high

school, that was not an error which a court of equity should attempt to remedy by an injunction that would compel the Board to withhold all assistance from the high school maintained for white children. If, in some appropriate proceeding instituted directly for that purpose, the plaintiffs had sought to compel the Board of Education, out of the funds in its hands or under its control, to establish and maintain a high school for colored children, and if it appeared that the Board's refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court.

The state court did not deem the action of the Board of Education in suspending temporarily and for economic reasons the high school for colored children a sufficient reason why the defendant should be restrained by injunction from maintaining an existing high school for white children. It rejected the suggestion that the Board proceeded in bad faith or had abused the discretion with which it was invested by the statute under which it proceeded or had acted in hostility to the colored race. Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined; and as this view disposes of the only question which this court has jurisdiction to review and decide, the judgment is

Affirmed.